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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1975
No. 75-8

ELMA E. DeLAND,

Petitioner,

vs.

BONSALL NOON, VINCENT WHELAN, MARTIN COUGHLIN, GERALD BROWN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

ELMA E. DeLAND
5116 Pacifica Drive
San Diego, California
(714) 273-9093

Pro Per

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2. In view of the Constitution of the United States, the common law, and decisions of the court in other cases in which false testimony, tampered evidence, fabricated and false facts, fabricated and false evidence, the omission or concealment of evidence results in depriving a citizen of any Constitutional right secured by the Fifth and Fourteenth Amendments ,	

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Petitioners right to equality and plain justice, requires that the decisions and judgment of the Respondents ought to be and should be vacated and declared null and void. 39

3. In view of the Supremacy Clause, Article VI of the Constitution of the United States, the common law and decision of this Court, and Section 1983, Section 1985 (2) (3), Section 1994 of U.S.C. Title 42; Section 241, Section 242 of U.S.C. Title 18, and Section 799 of the California Penal Code, The Federal Civil Rights Act of April 9, 1866, the Federal Civil Rights Act of April 20, 1871, Petitioner is authorized to institute and is entitled to maintain this action and vindicate her Constitutional rights secured and guaranteed to her by Article I, Sectio 10, Clause 1, the Fifth, First and Fourteenth Amendments of the Constitution of the United States. 42

4. In view of the Supremacy Clause, Article VI, the First, Fifth, Fourteenth Amendments, Article I, Section 10, Clause 1 , of the Constitution of the United States, common law, and Section 799 of the California Penal Code, Section 1985 (2) (3), Section 1983 U.S.C Title 42, Title 26 U.S.C Section 1652, and decisions of the Court, Petitioner's right of action to vindicate her Constitutional Rights is secured and guaranteed to her by the Fifth, First and Fourteenth Amendments of the Constitution. This action in the Federal Court may not be barred by Rule 8 (c) of the Federal Rules

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Petitioner, Elma E. DeLand, affected by the judgment and decision of the United States Court of Appeals for the Ninth Circuit set out in Appendix "A" and "B" -- respectfully prays that a Writ of Certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit, dated March 25, 1975, stamped " Do Not Publish".

A. OPINION BELOW

The decision rendered by the United States District Court for the Southern District of California, on January 9, 1974, is set out in Appendix "B".

The "Do Not Publish" opinion of the Court of Appeals, is set out in Appendix "A".

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B. JURISDICTION

The grounds on which the jurisdiction of this court is invoked is Title 28 U. S. C. Section 1652, to consider the restraints, requirements and provisions of the Constitution of the United States and Acts of Congress in pursuance thereof, and settle important questions of Federal Law that should be settled by this Court involving Petitioner's Constitutional rights under Article I Section 10, Clause 1, the First, Fifth, Seventh, Ninth, Thirteenth, Fourteenth Amendments of the Constitution of the United States.

(i) The Decision of the United States Court of Appeals for the Ninth Circuit in this matter is dated March 25, 1975 and was entered on March 25, 1975.

(ii) The Ninth District Court of Appeals has deceided important questions involving the laws of the Constitution and Acts of Congress in a selective manner and prejudicial to Petitioners substantive rights to due process that are not in accord with the Constitution of the United States, nor with Acts of Congress, nor a previous pronouncment of this Court, and resolve conflicts between the decision of the Court of Appeals in this matter and other decisions on the same questions of law that should be settled by this Court.

(iii) To consider and settle whether or not the Constitution of California Article VI Section 14 (Amendment adopted November 8, 1966) , Section 68902 of the California Government Code (as amended in 1967), California Rule of Court 976, (as amended November 11, 1966) and used in this case are unconstitutional as applied to the facts in this case, involving and adversely affecting the

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Constitutional rights of Petitioner guaranteed to her by Article I Section 10 Clause 1, the First Fifth, Tenth, Thirteenth, Fourteenth Amendments of The Constitution of the United States.

(iv) There is now pending in this Court, on a Writ of Certiorari, the decision of the Ninth Circuit Court of Appeals, Imbler vs. Pachtmann, 74-5435, which involves an unlawful judgment and decision in a criminal case involving acts of moral turpitude that bears on the facts in this case.

(v) The statutory provisions believed to confer on this Court jurisdiction to consider the decision and judgment of the Court of Appeals in this matter is Title 28, U.S.C. Section 1254 (1).

C. QUESTIONS PRESENTED FOR REVIEW

---

1. Did not the decision of the Ninth Circuit Court of Appeals deny substantive due process to Petitioner by dismissing her complaint without ruling as to whether or not the Respondents acted outside the scope of their authority in this case? If the Respondents acted outside the scope of their authority were they not reachable by Civil suit and not immune?

2. In order to sustain a judgment of judicial immunity in this case, is it not essential that the acts of the respondents must have been within the scope of their authority?

3. Are state Judges who have unlawfully acted outside the scope of their official judicial authority engaged in a judicial duty?

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4. Within the meaning of the term "jurisdiction in this case", were the respondents authorized to disregard, alter, extinguish any major material terms, covenants and conditions made material by the building construction contract?

5. Are not deliberate misrepresentations of facts and evidence, the omissions of material facts and evidence, false entries, purposeful fabricated false facts and evidence set out in certified Official Public Records, in common with, and essentialy the same 'in kind' crimes as falsifying evidence, fraud and perjury?

6. Are not the respondent's judicial decisions and judgments in this case, based as they are upon fabricated false facts, false entries, fabricated false evidence, illegal decisions and illegal judgments?

7. Is it not essential to equality under the law for the Courts to reverse, nullify and vacate decisions and judgments, whether civil or criminal cases, that are based upon deliberate misrepresentations, fabricated false facts, false entries, misrepresentations and fabricated false evidence?

8. Does not the conspiracy in this case, that was purposed to obstruct and defeat Petitioner in her lawful attempts to enforce her building contract, and with the intent to deny her the equal protection of the law, constitute a felony proscribed by An Act of Congress in the Civil Rights Act of April 9, 1866, Chapter 31, Stat 14, and in the Civil Rights Act of April 20, 1871, Chapter 22, Stat. 13, under Title 18 U.S.C. Section 241,

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that entitles Petitioner to relief and redress by the aforesaid Acts of Congress under Title 42 U.S.C. Section 1985 (2) (3)?

9. Was not Petitioner deliberately discriminated against, denied the equal protection of the law and oppressed in her inalienable Constitutional Civil and legal rights by the manner in which the respondents resorted to, and used in tandem, California Rule of Court 976, California Government Code Section 68902, California Constitution Article VI Section 14-- in disregard of and in violation of the Supremacy Clause of the Constitution of the United States set out in Article VI, Clause 2, Clause 3?

10. Whether Article VI Section 14 of the California Constitution (Amendment adopted November 8, 1966), Section 68902 of the California Government Code (in effect on October 17th and December 13th, 1967), Rule 976 of the California Rules of Court (as amended effective Nov. 11, 1966) and effective on October 17th and December 13th, 1967, are unconstitutional as applied to the facts on the face of the record in this case--in violation of the Constitution of the United States, Article I Section 10, Clause 1, the Fifth, Ninth, Tenth, Thirteenth, First and Fourteenth Amendments?

11. Was not the decision of the Ninth Circuit Court, dismissing Petitioner's action without deceiding the merits of her claims, prejudicial to Petitioner's substantive Constitutional rights -- an abridgement of and denial to Petitioner her fundamental rights to freedom, liberty, property, equality guaranteed to her by the First, Fifth, Ninth, Tenth, Thirteenth, Fourteenth Amendments, secured and guaranteed from any governmental abridgement, invasion or denial by the

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Supremacy Clause 3, Clause 2, of Article VI of the Constitution of the United States?

D. CONSTITUTIONS REQUIREMENTS ACTS OF CONGRESS STATUTES AND RULES INVOLVED

CONSTITUTION OF THE UNITED STATES

PREAMBLE: "We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution of the United States of America."

ARTICLE I:
Section 10:"Powers Prohibited to the States"

"Powers Prohibited, Absolutely"

1. No State shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts . . ."

AMENDMENT V:
"No person shall . . . be deprived of life, liberty or property without due process of law . . ."

AMENDMENT VII:
" In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . ."

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AMENDMENT IX:

"Certain Rights Not Denied To The People"

"The enumeration in the Constiution, of certain rights, shall not be construed to deny or disparage others retained by the people"

AMENDMENT X:

" State Rights"

" The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

AMENDMENT XIII:

1. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."
2. "Congress shall have power to enforce this article by appropriate legislation."

AMENDMENT I:

" Congress shall make no law respecting . . . or abridging the freedom . . . of the press . . . or the right of the people . . . to petition the government for a redress of grievances."

AMENDMENT XIV:

" . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Section 5. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

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ARTICLE VI. " General Provisions"

" SUPREME LAW OF THE LAND "

2. "This Constitution, and the laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. "

3. " The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, to support this Constitution; . . . "

The Federal Civil Rights Act of April 9, 1866, Chapter 31, Statute 27, is set out in Appendix "C". In a part pertinent to this case the Act of Congress proscribes:

Sec 1. all persons . . . shall have the same right, in every State . . . in the United States, to . . . enforce contracts, to sue, be parties, and give evidence . . . to . . . hold . . . real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property. . . "

Sec. 2. " And be it further enacted, that any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State . . . to the deprivation of any right secured or protected by this act, . . . shall be deemed guilty of a misdeameanor, and, on conviction shall be punished by fine . . . or imprisonment,

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or both, in the discretion of the court".

Sec. 3. " And be it further enacted, that the district courts of the United States, within their respective districts, shall have, exclusively of the Courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State . . . where they may be any of the rights secured to them by the first section of this act, . . . "

Sec. 10. " And be it further enacted, that upon all questions of law arising in any cause under the provisions of this act a final appeal may be taken to the Supreme Court of the United States".

The Federal Civil Rights Act of April 20, 1871, Chapter 22, Statute 13, is set out in Appendix "D". In a part pertinent to this case the Act of Congress proscribes:

Section 1. "Be it enacted . . . that any person who, under color of any law, statute, ordinance, regulation, custom, or useage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or useage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper

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proceeding for redress; . . . and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An Act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication; and the other remedial laws of the United States which are in their nature applicable in such cases."

Section 2. "That if two or more persons within any State . . . of the United States. . . shall conspire together for the purpose of in any manner impeding, hindering, obstructing,or defeating the due course of justice in any State . . . with the intent to deny to any Citizen . . . the due and equal protection of the laws, or to injure any person in his person or property for lawfully enforcing the right of any person . . . to the equal protection of the laws. . . each and every person so offending shall be deemed guilty of a high crime. . . And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of the conspiracy, whereby any person shall be injured in his person or porperty, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy, such action tc be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of

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appeal, review upon error, and other remedies provided in like cases in such courts under the provisions of the act of April ninth, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication."

Section 3. "That in all cases where . . . conspiracies in any State shall so obstruct or hinder the execution of the laws thereof, and of the United States, as to deprive any portion . . . of the people of such State of any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by this act, and the constituted authorities of such State shall either be unable to protect, or shall, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States; . . ."

Section 7. " That nothing herein contained shall be construed to supersede or repeal any former act or law except so far as the same may be repugnant therto; and any offences heretofore committed against the tenor of any former act shall be prosecuted, any proceeding already commenced for the prosecution thereof shall be continued and completed, the same as if this act had not been passed, except so far as the provisions of this act may go to sustain and validate such proceedings."

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Section 242 of Title 18 U.S.C. says:

> "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States , . . . shall be fined not more than $1,000.00 or imprisoned not more than one year, or both;..."

Section 1983 of Title 42 U.S.C. declares:

> "Every person who, under color of any statute, ordinance, regulation, custom, or useage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 1994 of Title 42 U.S.C. says:

> "The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in . . . State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any . . . State . . . by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the involuntary or voluntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void."

Section 241 of Title 18 U.S.C. declares:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; . . . they shall be fined not more than $10,000.00 or imprisoned not more than ten years, or both; . . . "

Section 1985 of Title 42 U.S.C. says:

> (2) " If two or more persons in any State conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State,. . ., with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully. . . attempting to enforce, the right of any person, . . . to the equal protection of the laws;"
>
> (3) " . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having or exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. "

CALIFORNIA CONSTITUTION ARTICLE VI.

Section 14:

"The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person."

"Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated. (New section adopted November 8, 1966).

Section 68902 of the California Government Code:

"Such opinions of the Supreme Court, of the courts of appeal, and of the appellate departments of the superior courts as the Supreme Court may deem expedient shall be published in the official reports. The reports shall be published under the general supervision of the Supreme Court". (Added Stats. 1967, c. 172, p. 1270, Sec. 2.)"

RULES FOR PUBLICATION OF APPELLATE OPINIONS. Adopted by the Supreme Court of the State of California, effective January 1, 1964*"

* Adopted pursuant to the authority contained in Section 14, Article VI , California Government Code Sec. 68895."

Rule 976 is set out in Appendix "E". In parts pertinent to this case Rule 976 states:

(b) "Standard for opinions of other courts). An opinion of a Court of Appeal . . . shall be published in the Official Reports if it involves a new and important issue of law, a change in an established principle of law,

or a matter of general public interest. "
(As amended effective November 11, 1966)".
(c) "(Courts of Appeal). Every opinion of a Court of Appeal shall be deemed to meet the standard for publication specified in subdivision (b) and shall be published in the Official Reports unless (1) a majority of the court rendering the opinion certifies that it does not meet the standard for publication and specifies it for nonpublication and (2) either no petition for hearing in the Supreme Court is filed in the cause or the petition is denied by the Supreme Court without ordering the publication of the Court of Appeal opinion (As amended effective November 11, 1966)".
(f) (Editing). "Written opinions of theSupreme Court, Courts of Appeal, . . . shall be filed with the clerks of the respective courts . . ."

Section 6200 of the California Government Code: Theft, destruction, falsification, or removal by officer custodian. "Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, wilfully destroying, mutilating, defacing, altering or falsifying, removing or secreting the whole or any part of such record, map, book, paper, or proceeding, or who permits any other person to do so, is punishable by imprisonment in the State prison not less than one nor more than 14 years."

Section 799 of the California Penal Code declares: (No limitation for murder, embezzlement of public moneys or falsification of public records:

When prosecution may be commenced)

"There is no limitation of time within which a prosecution for murder, the embezzlement of public moneys, a violation of Section 209, or the falsification of public records must be commenced. Prosecution for murder may be commenced at any time after the death of the person killed. Prosecution for the embezzlement of public money, a violation of Section 209, or the falsification of public records may be commenced at any time after the discovery of the crime."

TITLE 28 U.S.C. SECTION 1652:

" The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

TITLE 42 U. S. C. SECTION 1988:

" The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the Constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal causes is

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is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty".

TITLE 28 U.S.C SECTION 1343:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
(1) "To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, . . . "

TITLE 28 U.S.C. SECTION 1331:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

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THE FEDERAL RULES OF CIVIL PROCEEDURE

Rule 8 (a) " A pleading which sets forth a claim for relief . . . shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or several types may be demanded. "

(e) (2) " . . . a party may . . . state as many separate claims . . . as he has regardless of consistency and whether based on legal, equitable . . . grounds".

Rule 9 (b) "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally".

(c) "In pleading the performance or occurence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occured. "

Rule 10 (c) " A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes. "

Rule 18 (a) " A party asserting a cliam to relief as an original claim . . . may join, either as independent or as alternate claims, as many claims, legal, equitable, . . . as he has against an opposing party. "

(b) " Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims

may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money."

Rule 10 (c) "Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes".

Rule 8 (f) " All pleadings shall be so construed as to do substantial justice."

E. STATEMENT OF THE CASE

1. Proceedings and Jurisdiction:

This case arises from the complaint, by Petitioner, that San Diego County Superior Court Judge Bonsall Noon was a conspirator in a conspiracy purposed with the intent to violate the law, to obstruct the due administration of the law, to cheat and defraud Petitioner out of her property and her Constitutional rights, to obstruct and defeat Petitioner in her attempts to lawfully enjoy her privileges and immunities, her right to property she contracted for, her right to the equal protection of the law, and, in furtherance of the conspiracy, Respondent Noon fabricated false facts concering the evidence produced in a nonjury trial he conducted involving a building

construction contract.

Based upon his false entries and fabricated false facts Respondent Noon rendered an unlawful, illegal decision that the building contractor substantialy performed the terms, covenants and conditions of his building construction contract, and ordered an unlawful illegal money judgment against Petitioner (and her Husband).

In an appeal to California State Appeals Court Justices Vincent Whelan, Martin Coughlin and Gerald Brown, in the Court of appeals located in the City of San Diego, the Respondents were conspirators in the conspiracy.

In furtherance of the conspiracy the Respondents did not correct any of Judge Noon's "errors", but, instead, by mutual agreement, "affirmed" Respondent Noon's unlawful, illegal money judgment and certified his false entries and fabricated false facts. In furtherance of the conspiracy, Respondents Whelan, Coughlin and Brown, themselves, falsified evidnce - they omitted Fact 1, Fact 2, Fact 5, Fact 6 to create a false impression, and, they fabricated false evidence in order to sustain the Superior Court's unlawful illegal judgment.

The Respondent's fabricated false evidence to create a false impression and cover-up for certain private persons and for certain of the City, County and State law enforcement agencies involved in a continuing conspiracy with the contractor, that was purposed with the intent to allow the contractor to violate his building contract , to allow the building contractor to violate the building laws, and cheat and defraud Petitioner out of her vested rights and property she contracted for under the terms, covenants and conditions of the building construction contract.

The Respondent's Appellate Opinion filed on October 17, 1967, is certified for Nonpublication, Rule 976 of the California Rules of Court.

The decisions of the Respondent's are discriminatory, unlawful, illegal. They are repugnant to the letter, spirit and intent of Article I Section 10 Clause 1, the Fifth, Thirteenth, First, Fourteenth Amendments of the Constitution of the United States of America and violate Petitioners Constitutional rights secured thereby.

On December 13, 1967, the California State Supreme Court denied a petition, without comment.

Subsequently, Petitioner has been unable to find any lawyer who would help her vindicate her Constitutional rights.

Subsequently, the law enforcement agencies of the City and County of San Diego, and of the State of California, have refused and failed to protect Petitioner and enforce the law.

Through her own research, Petitioner discovered, In March 1973, Section 799 of the California Penal Code. Section 799 declares, in plain English, there is no statute of limitations on the prosecution of an action for the Falsification of Public Records. At that same time she discovered Section 6200 of the California Government Code declares that every officer who has in his custody for any reason, who, or who allows, any person to falsify public records is guilty of a felony specified in Section 799 of the Penal Code.

Subsequently, Petitioner discovered Title 42 U.S.C. Section 1983, Section 1985 (2) (3), Section 1994 and the Federal Civil Rights Acts of April 9, 1866, and of April 20, 1871, do not

exclude a middle-income, past middle-age, married female caucasian from enjoying and exercising her First Amendment right to Petition the judicial branch of the Government for vindication of her Constitutional rights and redress for the violations of and deprivations of her inalienable rights secured and guaranteed to her by Article I Section 10, Clause 1 , The First, Fifth, Thirteenth, and Fourteenth Amendments of the Constitution of the United States.

Petitioner, Pro Per, filed an action against the Respondents on legal and equitable grounds. She substantiated her claims with irrefutable Public Records and other chronological documentary evidence that is within eighty-six Exhibits that are part of her complaint filed on November 26, 1973, in the District Court for The Southern District of California, located in the City of San Diego.Civil Case No. 73-502-E.

Petitioners legal and equitable claims are grounded on her Constitutional rights to property, substantive due process and the equal protection of the law secured and guaranteed to her by Article I Section 10, Clause 1, The Fifth, First and Fourteenth Amendments of the Constitution of the United States. Her action is authorized by the Federal Civil Rights Act of April 9, 1866, and of April 20, 1871, Title 18 U.S.C Section 242, Title 42 U.S.C. Section 1983 - Title 18 U.S.C. Section 241, Title 42 U.S.C. Section 1985 (2) (3), Section 1994. In this action, the prosecution thereof is authorized under Section 799 of the California Penal Code and Section 1988 U.S.C. Title 42.

Petitioner prayed the Court to vindicate her rights and redress her grievances by :

1. Ordering each of the Respondents to reimburse to her the amount of the fraudulent

judgment ($16,774.89) entered against Petitioner (and her husband) tripled to the sum of $50,324.67, together with interest from March 7, 1966 at the rate of 7% per annum.

2. That Petitioner be awarded damages in excess of $7,000.00 or according to proof for attorneys fees, court costs, Reporters Transcripts, Briefs and other incidental expenses incurred by Petitioner pursuant to the Judicial Proceedings had in Superior Court Civil Case No. 289825, and in the State Court of Appeals for District Four, Division One, Civil Case 4th Civil No. 8527.

3. That Petitioner be awarded exemplary damages for the outrageous mistreatment of her and the deprivations of her rights by the Respondents in the sum of $200,000.00; and for the tremendeous hardships and the deprivations of the opportunity to pursue her normal life as the result of the acts of the Respondents, Petitioner be awarded the sum of $200,00.00.

4. That Respondent Noon's false and fraudulent Findings of Fact and Conclusions of Law and fraudulent judgment in Superior Court Civil Case No. 289825 be ordered vacated.

5. That Respondent's Whelan, Coughlin and Browns' false and fraudulent Appellate Opinion for 4th Civil Case No. 8527 be ordered vacated.

6. That Petitioner be awarded the costs of the suit incurred herein, including

reasonable compensation for Petitioner's time, and for such other and further relief as the Court may deem just and proper.

Counsel for each of the Respondents are themselves public officers.

Evelle Younger, California State Attorney General by his Deputy Attornies General, acted on behalf of Respondents Whelan, Coughlin and Brown.

Robert G. Berrey, San Diego County Counsel by his deputy County Counsel acted on the behalf of Respondent Noon.

The Respondents (Counsel) avoided answering Petitioners charges by filing motions to dismiss Petitioners action. They claimed (1) Petitioners action is barred by a three year Statute of limitations under Rule 8 (c) of the Federal rules of Civil Proceedure and Section 338 (1) of the California Code of Civil Proceedure (2) the respondents claimed they enjoy absolute immunity from accountability to the victims of their unlawful acts, adverse rulings and illegal decisions and judgments, even when they have acted corruptly and maliciously, because, in Pierson vs. Ray (April 1967) 386 U.S. 547, the Supreme Court pronounced that Federal Law Section 1983 U.S.C. Title 42 excludes judges from liability for damages to their victims, for that reason, under Rule 12 (b) (6) of the Federal Rules of Civil Proceedure, Petitioners action is barred because of failure to state a claim upon which relief can be granted. (Cl. Tr. pp. 51-56, 58-64, 128-133).

Petitioner filed Answer and Opposition to Motion to Dismiss (Cl Tr p 65). Filed a motion

for Summary Judgment (Cl Tr p 87. Filed a Motion for Default Judgment (Cl Tr p. 125-133). Her motions were unanswered and ignored by the Respondents.

A strange, very perfunctory hearing on the motions was held on January 7, 1974, in the District Court located in the City of San Diego, before visiting Judge John C. Bowen.

The 86 exhibits of chronological documentary evidence that are part of Petitioners complaint and her demands for redress and equitable relief reasonably complies with Rule 8 (a) (2) (3) (e) (2); Rule 9 (b) (c); Rule 10 (c); Rule 18 (a) (b) of the Federal Rules of Civil Proceedure.

Judge Bowen did not find that Petitioners Answers in Opposition to the Motions, her motion for Summary Judgment, her reasons for her Motion for Default Judgment against Respondent Noon, nor her oral arguments to him , were not valid., --Judge Bowen just denied them, and the defendants motion to dismiss Petitioners action was granted. (Rep. Tr. January 7, 1974). He did not find that Petitioner was not entitled to have vacated Respondents unlawful and illegal decisions and judgments.

Order of Dismissal of Petitioners action , Civil Case No. 73-502-E, was entered on January 9, 1974, (1) Petitioners action was dismissed as to Respondents Noon, Whelan, Coughlin and Brown for the reasons that the action is barred by the Statute of limitations and the complaint fails to state a cause of action upon which relief can be granted.

(2) Petitioners motion for default judgment is

denied.
(3) Petitioners motion for summary judgment is denied. (Rep. Tr. January 9, 1974). Order of Dismissal is set out in Appendix "B".

Petitioner's appeal was submitted, without oral argument, to the Ninth Circuit Court of Appeals in Los Angeles, on March 5, 1975. In writing, she submitted additional citations that are relevant to this case.

On March 25, 1975, the Ninth Circuit Court of Appeals affirmed the District Courts Order of Dismissal of Petitioners action. The "Do Not Publish" decision of the Ninth Circuit reveresed in their order, the reasons given. Their decision entered on March 25, 1975 states:

"The plaintiff in this case claims that a California Superior Court judge and three Judges of the Court of Appeal all conspired to violate her civil rights. The claim arises from litigation in which the Superior Court Judge ruled against her and the Court of Appeal affirmed. In the present civil rights action, the district court dismissed her complaint on the grounds of (1) judicial immunity and (2) the statute of limitations. We affirm".

" (1) Judges are immune from liability for damages for acts committed within their judicial jurisdiction. (Cited cases Appendix "B"). "

"(2) The California three-year tort statute of limitations applies to civil rights actions. (Case cited Appendix "A"). The plaintiff did not file within the three-year period and so her claim was untimely. "
"The judgment of dismissal is affirmed".

Jurisdiction in the case was conferred on the District Court by Title 28 U. S. C. Section 1343 (1) (3) (4), Section 1331.

2. Material Facts

Petitioners lawyer, at the behest of the building contractor, filed a civil complaint against the building contractor on January 19, 1965, for Declaratory Relief, Breach of Contract and Damages. Superior Court Civil Case No. 289825 (Complaint , Exhibit " 52" pp. 940, 941, 942, Exhibit "15", pp 1-11).

The contractor filed his answer, affirmative defenses and Cross-complaint against Petitioner (and her Husband) on March 5, 1965. (Complaint, Exhibit "15", pp. 12-29).

At the conclusion of the nonjury trial on February 3, 1966, Respondent Noon ruled there was a substantial performance of this contract (building construction contract) by the building contractor. The trial was a charade and a mockery of justice. (Complaint, Exhibit "52", Respondent Noon's ruling p. 968).

The Reporter's Transcript of the oral and documentary evidence produced and introduced in the non-jury trial (Complaint, Exhibit "52" and exhibits included therein) makes plainly clear Respondent Noon's ruling of substantial performance is radicaly contrary to the evidence, is radicaly contrary to the plain rules of common law that requires every person to be honest in their business dealings with their fellow man, no less so when their dealings involve their obligations under the terms, covenants and conditions of a building construction contract.

Respondent Noon's ruling is contrary to the State "Judge-made" laws that must govern whether or not a building contractor substantialy complied with and substantialy performed his obligations under the terms, covenants and conditions that are specified and spelled out in his building construction contract.

Respondent Noon's ruling of substantial performance by the building contractor is not authorized by any law. His ruling has no published precedent.

Counsel for Respondents Whelan, Coughlin and Brown admits that in an unpublished opinion the decision of Judge Noon was affirmed by them following an "adverse ruling" by Respondent Noon.

A copy of the Public Record--Respondent Noon's "Findings of Fact and Conclusions of Law" filed on March 7, 1966, is set out in Appendix "F".

A copy of Respondents Whelan, Coughlin and Browns' determination of the cause, set out in their appellate opinion, a Public Record, filed on October 17, 1967, Certified for Nonpublic-action in the Official Reports. (Rule 976 of the California Rules of Court) is set out in Appendix "G".

The Appellate Opinion makes plainly clear Respondent's Whelan, Coughlin and Brown agreed to and affirmed the money judgment Respondent Noon ordered entered against Petitioner (and her Husband), and omitted in the Opinion Respondent Noon's Fact 1., Fact 2., Fact 5., Fact 6., and his conclusions of law 1., 2., 3. The face of the record makes plainly obvious respondents Whelan, Coughlin and Brown affirmed Respondent Noon's false entries and fabricated false facts and agreed to affirm his decision based

thereupon, and the money judgment that was based upon his decision.

The record of chronological documentary evidence, as well as all other of Petitioner's exhibits constitutes clear proof that the respondents conspired to obstruct and defeat Petitioner in her attempts to lawfully enforce the terms, covenants and conditions of the building construction contract and, in furtherance of the conspiracy, the respondents omitted material evidence, fabricated false facts, fabricated false evidence, purposed with the intent to cover-up the conspiracy, purposed to obstruct the due administration of the law and deny Petitioner the equal protection of the law.

The record makes plainly clear Respondents Whelan, Coughlin and Brown agreed to and certified that the "Facts" and "The Evidence" set out by them was factual and true. The fact that "Findings of Fact" set out and "The Evidence" set out in their appellate opinion is neither factual nor true is very easily shown by a few specimens of documentary evidence on record in:

Testimony by Bugenhagen (the contractor) in the Reporter's Transcript (Complaint Exhibit "52") pp. 236, 17, 18, 20, 32, 33, 35, 80, 84, 95, 118, 119, 175 is set out in Appendix "H".

Testimony by Plaintiff's expert witness (Doughty) in the Reporter's Trasncript (Complaint Exhibit "52") pp. 301, 323 is set out in Appendix "I".

Bugenhagen's (the contractor) letter of September 4, 1963 to Mr. Howard B. Clayton, Petitioners lawyer at that time (Complaint Exhibit "19" Exhibit "52") ;

City of San Diego Building Inspection Department Notice of October 15, 1963 , re the noncomplying roof, notice mailed to Contractors State License Board (Complaint , Exhibit "14", Exhibit "52");

Roy O. DeLand notice mailed to Bugenhagen (the Contractor) May 8, 1964 , re notice that action is being taken to petition the court to vacate the arbitration award (complaint, Exhibit "26," Exhibit "52") - -each of the three foregoing documents are set out in Appendix "J".

The fact that Respondent Noon's "Findings of Fact" are radicaly contrary to the evidence and are neither factual nor true- - and his " Conclusions of Law" is a violation of the law is shown by the foregoing documents set out in Appendices "H", "I", "J", and elaborately proven by voluminous chronological documentary evidence within Petitioner's complaint in her Exhibit "15 " , Exhibit "52" shows his "Findings of Fact" , Fact 1., Fact 2., Fact 3., Fact 5., Fact 7., Fact 8. are contradictory, one to another. ---Finding of Fact 6. is wholly false-- Finding of Fact 1. and Fact 5. (with the exceptions noted in complaint) are factual and true. --- Fact 1. and Fact 5. contradict, and are irreconcilable with Fact 1., Fact 2., Fact 7., Fact 8. --- Fact 1. and Fact 5. show beyond a shadow of a doubt that Fact 3. and Fact 8. are gross fabricated false facts.

The false enty in Findings of Fact 6. states that an additonal sum of $2,083.52 is due to the building contractor. The record is devoid of any accounting for the additional sum of $2,083.52. Petitioner does not know why that sum was added on, nor what it was for.

Conclusions of law No. 2 the false entry states the sum of $18,163.52 is due to the building contractor, less the sum of $1,388.63 allowed to Petitioner as a set-off per fabricated false Findings of Fact No. 8.---The record is devoid of any accounting for the sum of $18,163.52.

The record makes plainly clear respondent Noon's false entries and money judgment against Petitioner perpetrated a deliberate fraud upon Petitioner (and her Husband).

The record makes plainly clear Respondent Noon's false entries and money judgment against Petitioner (and her Husband) forced Petitioner to pay the contractor the sum of $2,083.52 for materials and labor she did not contract for and of which she knows nothing about, and the materials and labor are not even spelled out in the false entry. Respondents false entry in his conclusions of law forced Petitioner (nd her Husband) to pay the contractor the sum of $18,163.52 less the sum of $1,388.63 set-off allowed to Petitioner and no where on the record is there any evidence that the sum of $18,163.52 nor any other sum of money was due to the building contractor.

The record makes plainly clear the numerous fabricated false facts stated in the Respondents "Findings of Fact" and the omissions of material facts and the fabricated false evidence stated in the Appellate Opinion deprived Petitioner of property she contracted for but she did not ever receive.

The judgment entered against Petitioner, in effect, ordered the confistication of Petitioners property without just compensation therefore.

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In her oral arguments before District Judge Bowen, Petitioner contended :

1. She could not be barred from enjoying her Constitutional rights secured to her by the Constiution simply because she could not find a lawyer to help her vindicate her rights--and to help herself, she had spent time studying and sorting out the case,

2. The Respondent's had no jurisdiction (not authorized) to falsify facts and falsify evidence,

3. The Respondent's had no jurisdiction (not authorized) to hold Petitioner liable for the contractors deliberate violations of the law,

4. That to order the decisions and judgments of the Respondents vacated and declared null and void was only equitable.

5. That there is no statute of limitations on an action for fabricating false facts and fabricating false evidence

6. The Respondent's had no jurisdiction (are not authorized) to disregard, and ignore Petitioners vested legal rights under the terms, covenants, and conditions specificaly set o ut in the building construction contract,

7. Respondent's had no jurisdiction (are not authorized) to disregard, ignore and extinguish the building contractor's legal obligations under

the terms, covenants and conditions he specificaly set out in his building construction contract , and Petitioners plans and specifications he had drawn and prepared for Petitioner which specificaly were the subject of the building construction contract and were a part of the building construction contract.

8. Respondent's had no jurisdiction (are not authorized) to make and enforce a law that impaired Petitioners contract and impaired her vested legal rights under the contract.

Counsel for the Respondent's ignored the fact that Petitioners action and her right to maintain her action are authorized by the Civil Rights Acts of April 9, 1866 and of April 20, 1871, Section 1985 (2) (3), Section 1994 U.S.C. Title 42, The First, Thirteenth, Fourteenth Amendments of the Constitution of the United States and is authorized by Section 799 of the California Penal Code.

In his motion to dismiss Petitioners action, Counsel for Respondent Noon stated (Cl. Tr. p. 130)

> "Plaintiff has filed this action pursuant to 42 U.S.C. 1983 against the Honorable Bonsall Noon, Judge of the San Diego County Superior Court, State of California alleging he violated her Civil Rights because of his decision filed on March 7, 1966 in case No. 289825".

In motions to dismiss Petitioners action, Counsel for Respondents Whelan, Coughlin and Brown stated (Cl. Tr. p. 60)

" Plaintiff has filed this action pursuant to 42 USC 1983 against Presiding Justice Gerald Brown, Justice Vincent Whelan, Justice Martin Coughlin of the California Court of Appeal, Fourth Appellate District, Division One, alleging they violated her Civil Rights because they affirmed the decision of Judge Bonsall Noon, of the Superior Court of San Diego County, in an unpublished opinion filed on October 17, 1967, after plaintiff took an appeal to the Court of Appeal following an adverse ruling in the Superior Court."

Confronted with the evidence and called to account by Petitioner, the Respondent public officers claim they are not answerable for their unauthorized acts, nor for their criminal conduct and their criminal acts in furtherance of a scheme of conspiracy that was purposed with the intent to obstruct the due administration of the law and deny Petitioner the equal protection of the law, since , they claim, judges are immune from damages for their acts, since, they claim, these acts occured as part of their judicial duties (Rep. Tr. p. 3, 4, January 7, 1974).

Respondnet Noon's counsel simply ignored the reasons for Petitioners cause of action, and on page 4, Rep. Tr. January 7, 1974, counsel stated:

" I would like to say, on one point the plaintiff raises with respect to the jurisdiction of the Superior Court, apparently the action was one based on a contract, which is clearly within the jurisdiction of the Superior Court of the State of California, and I think really what this case boils down to is a disagreement by plaintiff as to how the

case was decided in the trial court, and the fact the appellate judges affirmed the judgment of the Superior Court".

In words that cannot be construed as truthful, Respondents Whelan, Coughlin and Browns' counsel stated on page 4, Rep. Tr. Jan. 7, 1974:

"What has occured in this case is that Justices Brown, Whelan and Coughlin have merely written an appellate opinion affirming the judgment of Judge Noon."

Chronological documentary evidence of the scenario of the scheme of conspiracy, and of the acts of the respondents in furtherance of the conspiracy to obstruct and defeat Petitioner, to obstruct the due administration of the law and deny Petitioner the equal protection of the law is set out in Petitioners complaint and eighty-six exhibits which are part of her claim (Cl Tr p. 1-50). Among those 86 exhibits are:

(a) The Reporter's Trasncripts of the lawyers manuvers and manipulations in the proceedings which vacated the illegal arbitration award on July 20, 1964 in Superior Court Civil Case No. 286997. (Complaint, Exhibit "32".

(b) The Reporter's Transcript of the testimony and documentary evidence produced and introduced in the nonjury trial conducted by Respondent Noon together with the exhibits introduced in the trial Superior Court Civil Case No. 289825. (Complaint, Exhibit "52" the period covering January 21 - Feb. 3, the year 1966. (Cl Tr. P. 1-50)

(c) The Reporter's Transcript of the lawyers oral proceedings in the State Court of Appeals before Respondent's Whelan, Coughlin and Brown on September 12, 1967 in 4th Civil Case No. 8527 (Complaint, Exb. "53") Cl. Tr. 1-50.

(d) The Clerks Transcript of the record on Appeal to the Fourth District State Court of Appeal (Complaint Exhibit "15"), all of which irrefutably prove that in furtherance of the conspiracy purposed with the intent to violate the building laws, to obstruct the due administration of the law and deny Petitioner the equal protection of the law, Respondent Noon's "Findings of Fact and Conclusions of Law", March 7, 1966, is a Public Record in which "Facts" set out are neither factual nor true. (Complaint Exb. "15"). Respondent Whelan, Coughlin and Browns' Appellate Opinion , Certified for Nonpublication Rule 976, October 17, 1967, is a Public Record in which "Facts" and "The Evidence" set-out are neither factual nor true. (Complaint Exhibit "54") Cl. Tr. p. 1-50.

There are no published cases in which the Court has ruled that a judge is immune from liability for damages when his acts are unauthorized and outside the scope of his authority; or when his acts constitute criminal conduct proscribed by an Act of Congress, in furtherance of a conspiracy purposed with the intent to allow a building contractor to violate his building contract and the building laws, to obstruct the due administration of the law and deny a citizen the equal protection of the law.

None of the cases cited by the

respondents , and cited by the Ninth Circuit Court, deals with Section 1985 (2) (3), Section 1994 USC Title 42, Section 241 U.S.C Title 18, in a conspiracy that was purposed to obstruct justice and allow a building contractor to violate the building laws, to obstruct the due administration of the law and deny a citizen the equal protection of the law---and the unauthorized and positively criminal acts committed by judges in furtherance of the conspiracy, that constitutes criminal conduct proscribed by the Federal Civil Rights Act of April 9, 1866 , of April 20, 1871.

The cases cited by the Ninth Circuit Court do not deal with Section 1985 (2) (3) Section 1994 U.S.C Title 42,Section 241 U.S.C. Title 18.

There are no published cases where the Court has sustained an "adverse ruling, "decision" and "judgment" that is based upon fabricated false facts and fabricated false evidence.

The respondent's "Findings of Fact and Conclusions of Law" and "The Evidence" are are as false today as the day they were fabricated.

The passing of time has not restored to Petitioner her property (money) that illegaly was taken from her by the respondent's money judgment entered her (and her Husband).

The passing of time has not restored Petitioners home to the condition required by the building construction contract and by the laws of the State of California and the City of San Diego.

The passing of time has enhanced the oppressive acts against Petitioner for attempting to vindicate her rights, and has increased the

the hardships she suffers , as the result of the unauthorized acts and the criminal conduct of each of the respondents.

Notice of appeal was filed (mailed by Petitioner) in the Ninth Circuit Court of Appeals, and served upon each of the respondents on April 8, 1975.

F. CONCISE ARGUMENT- REASONS FOR ALLOWANCE OF WRIT

1. Preliminary Matters.

Because of the unlawful acts committed by Respondents (Judges) Bonsall Noon, Vincent Whelan, Martin Coughlin, Gerald Brown, and their acts constitute criminal conduct proscribed by an Act of Congress and, because of the role played by, and the conduct of lawyers involved in this case (commencing on or about August 26, 1963, and continuously thereafter through about January 1968), none of the many lawyers Petitioner has consulted and tried to get help from since early January 1968, have been willing to undertake this case for reasons of their own personal bias, or for fear of reprisals and the consequences of judicial prejudice against them in their professional practice.

Since a hearing in the California State Supreme Court was denied December 13, 1967, without comment, it is not possible for Petitioner to get the unlawful State Court decision and judgment against Petitioner vacated, nor for Petitioner to receive any other equitable relief in the State Courts.

Since documentary evidence on record in this case makes plainly obvious the fact the State Attorney General has ignored, refused and failed to enforce the laws, Petitioner is forced to act as a "private attorney general" pro per.

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2. In view of the Constitution of the United States, the common law, and decisions of the court in other cases in which false testimony, tampered evidence, fabricated and false facts, fabricated and false evidence, the omission or concealment of evidence results in depriving a citizen of any Constitutional right secured by the First, Fifth and Fourteenth Amendments, Petitioners right to equality and plain justice, requires that the decisions and judgment of the respondents ought to be and should be vacated and declared null and void.

Title 42 U.S.C. Section 1983, Section 1994, Section 1985 (2) (3) , Section 799 of the California Penal Code authorizes Petitioners action.

Title 28 U.S.C. Section 1343 (1) (3) (4) authorizes this Court to vacate the decisions and judgments of the respondents and grant other proper and just equitable relief to Petitioner.

Petitioner has found no case, neither civil or criminal, in which the Court has allowed to stand, a decision and judgment that is based upon fabricated false facts and fabricated false evidence.

No where on the record is there a shred of evidence to support the "Facts" set out in respondent Noon's Finding of "Fact 3." that the building contractor acted in "good faith" and substantialy complied with and substantialy performed the obligations set out in his building construction contract; that there was no fraud on the part of the building contractor: that his substitutions and deviations from the terms, covenants and conditions specified and set out in his building contract were not willful, intentional or fraudulent; that the contractors omissions, substitutions and deviations did not effect the usefulness of the building; that the contractor completed the building on August 19, 1974.

The evidence is far different than that set out in "Findings of Fact No 8. No where is there any evidence Petitioner authorized the contractor's violations of the contract and violations of the building laws.

Nowhere is there evidence to support "Finding of Fact No. 6" that the sum of $2,083.52 was due to the contractor; nor conclusions of law No. 2, that the sum of $18,163.52, or any other sum was due to the contractor.

The evidence supports his "Findings of Fact No 1. and Fact No. 5." that the contractor did not complete the construction, nor did Petitioner file a notice of completion.

Nowhere is there any evidence to support his "Finding of Fact No. 2", that the contractor did not breach his contract; that the construction was not substandard; that the value of the construction was not grossly less than the value of the contract.

The record does not support "The Evidence" set out in respondents Whelan, Coughlin and Brown' appellate opinion (Certified for nonpublication). It is clear the respondents condoned the conspiracy . They omitted Fact 1, Fact 2, Fact 5., Fact 6. , omitted material evidence . Their statement that Mrs DeLand protested unsuccessfully to the building inspector and various other agencies of government the decision of the building department that the plastering met the city's requirements--is a true statement.

Section 6200 of the California Government Code declares falsification of public records is a felony. Section 799 of the California Penal Code declares there is no statute of limitations on the prosecution of an action for the falsification of public records.

Historicaly, relief in equity against a judgment may be obtained where the fraud relied upon for relief consists of the corruption of the tribunal rendering the judgment.

Baldwin v. Davidson 130 Mo. 118 (1897) the court stated:

> " Any improper omission or concealment, which results in loss to those interested, is sufficient without regard to the motives that actuated it. "

Also relevant to Petitioners cause of action are recent cases involving criminal conduct of public officers:

Imbler v. Pachtman, CA Cal. 500 F. 2nd, 1301, the judgment in a criminal case was vacated because the false testimony of a witness had been used.

In the City of San Diego, cases against several persons were either vacated or dismissed because of the falsified evidence and perjury of a police officer, in the case of "The People of the State of California, County of San Diego vs. Herman P. Wiggins, Superior Court Criminal No. 32384. In sentencing the formor officer, Judge Orfield is reported to have called the incidents " a grotesque charade" and a "mockery of law enforcement". The Deputy District Attorney Frank Sexton is reported to have said, "the main issue - crimes of falsifying evidence and perjury - strikes at the very heart of the justice system".

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3. In view of the Supremacy Clause, Article VI of the Constitution of the United States, the common law and decision of this Court, and Section 1983, Section 1985 (2) (3), Section 1994 of U.S.C. Title 42, Section 241, Section 242 of U.S.C. Title 18 , and Section 799 of the California Penal Code, The Federal Civil Rights Act of April 9, 1866, and the Federal Civil Rights Act of April 20, 1871, Petitioner is authorized to institute and is entitled to maintain this action and vindicate her Constitutional rights secured and guaranteed to her by Article I, Section10, Clause 1, the Fifth, First and Fourteenth Amendments of the Constitution of the United States.

In United States of America vs. John Robert Heck, Jr., et el. (No. 73-1671) January 30, 1974, The Ninth Circuit Court defined a conspiracy as a combination of two or more persons to

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accomplish some unlawful purpose, or some lawful purpose by unlawful means.(p. 11)

Petitioner has found no Supreme Court decision which declares Judges are absolutely immune from liability for damages, or otherwise, when their acts are unauthorized and are outside the scope of their authority, nor, when their conduct and acts constitutes a violation of common law and Title 18 U.S.C. Section 241, Section 242; Title 42 U.S.C. Section 1983, Section 1994, Section 1985 (2) (3).

To the contrary---

In O'Shea v. Littleton, 94 S. Ct. 669 (p. 672) January 1974, the Supreme Court stated:

> " The judicially fashioned doctrine of official immunity does not reach so far as to immunize criminal conduct proscribed by an Act of Congress".

The Ninth Circuit Court dismissed Petitioners claim on the grounds the respondents are immune from liability for damages.

The Ninth Circuit cited Gregory v. Thompson, 500 F. 2d 59 (1974) (Appendix "A"). In that case, the Ninth Circuit held the judge was not immune from liability for damages to his victim, the Court stated:

> " It is within a judge's power --indeed, it is his obligation --to "protect the sanctity and dignity of . . . courtroom proceedings . . .". It may even be necessary in an isolated instance to use physical force to preserve order. Though necessary, that does not mean the judge is immune. The decision to personally evict someone from a courtroom by the

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use of physical force is simply not an act of a judicial nature, and is not such as to require insulation in order that the decision be deliberately reached. "

The Ninth Circuit appears to say, when the judges acts are physicaly overt, such an act is not of a judicial nature, even though necessary, the judge is not immune from liability to the person whose rights he has offended --but when the judges violence to rights of another person is covert, and is accomplished with a pen and typewriter, the judges are immune from damages to their victims, whose constitutionaly secured rights they have deliberately, purposely violated.

In Petitioners case, the judges made the decision to condone a scheme of conspiracy, and themselves engaged in the scheme of conspiracy, and in furtherance of which they made the decision to set out in public records, facts and evidence that are neither factual nor true, but are, as a matter of record, false entries, fabricated false facts and fabricated false evidence. They further made the decision to certify their decisions and judgments based upon fabricated false entries, false facts and false evidence , for Nonpublication.

The Ninth Circuit appears to have placed comity to their brethern on the bench above the Constitution of the United States.

The Third Circuit Court declared in

Scher v. Board of Education of West Orange, 424 F. 2d 741, 744 (3rd Cir. 1970):

" A case brought under the Civil Rights Act should not be dismissed at the pleading stage unless it

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> appears to a certainy that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of claim".

The Court, in Littleton v. Berbling, 468 F. 2d 389 (1972) declared:

> "Discretion of courts is limited by duty to follow the law and a blanket pattern of discrimination cannot be said to conform to such duty; a discretionary action is subject to review and reversal for abuse of discretion."
> " The word discretion is limited by duty to follow the law . . . and by abuse of discretion is meant action which is arbitrary, fanciful, or clearly unreasonable."
> "it is clear that the failure to do one's duty is actionable under the statute as passed by Congress. Thus criminal liability can attach from such failure . . ."

In Civil Rights Case, such as is Petitioners, the Court declared in

Jacobson v. Schaefer, 441, 2d 127 (1971),

> " . . . the judicial immunity doctrine does not reach suits for purely equitable relief. Branlett v. Peterson, 307 F. Supp 1331, (D.C. Fla. (1969)).

In Jacobson v. Schaefer, the Court further declared that a Civil Rights case should not be dismissed, where, as is the fact in Petitioners case, any person has been criminaly deprived of a constitutional protected vested right, the doctrine of judicial immunity does not apply to the commission of a "clearly illegal" act on the part of a judge. The Court stated

> "the judicial immunity doctrine for damage suits . . . would not apply to the commission of a "clearly illegal act" on the part of a judge."

---

4. In view of the Supremacy Clause, Article VI, the First, Fifth, Fourteenth Amendments, Article I, Section 10, Clause 1 of the Constitutio n of the United States, common law, and Section 799 of the California Penal Code, Section 1985 (2) (3) Section 1983, U.S.C. Title 42, Title 28 U.S.C. Section 1652, and decisions of the Court, Petitioner 's right of action to vindicate her Constitutional Rights is secured and guaranteed to her by the Fifth, First, and Fourteenth Amendments of the Constitution. This action in the Federal Court may not be barred by Rule 8 (c) of the Federal Rules of Civil Proceedure, and Section 338 (1) of the California Code of Civil Proceedure.

The Respondent's do not claim that Petitioner has not diligently attempted to vindicate her rights.

Nowhere in the Constitution is it implied that Petitioner's Rights secured by the Constitution may be limited to a fixed period of time, nor extinguished after a fixed period of time.

The claim that Rule 8 (c) of the Federal Rules of Civil Proceedure, and Section 338 (1) of the California Code of Civil Proceedure supersedes the prohibitions and guarantees of the Fifth, First and Fourteenth Amendments is a notion that other Courts do not indulge. Furthermore, Section 799 of the California Penal Code declares there is no statute of limitations on the prosecution of an action for the falsification of public records.

> Bursey v. U.S.C.A. Ca. (1972) 466 F. 2d 1059, the Court declared: " . . . the judiciary, no less than it's governmental co-ordinates, is bound by the Constitution".

In Ka Haar Inc. vs. Huck 345 F. Supp 54 (1972) the Court declared plaintiffs have Constitutional right to prosecute an action for intentional deprivations of Constitutional Rights.

Ney v. State of California, 439 F. 2d 1285 (1971) the Ninth Circuit Court declared that the State of California tort claims act was not applicable to an action instituted under the Civil Rights Act against a City police Chief , who allegedly questioned prisoner without advising him of his rights, disregarded prisoner's request to consult counsel, and altered electronic tapes to make it appear that prisoner had incriminated himself. (Appendix "B").

Certinaly, Imbler v. Pachtman is a case in point where the California tort claims act did not apply.

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Petitioner has not received equal treatment, she has been denied equality, she has been denied the equal protection of the law, she has been denied justice by the decisions and opinions of the Courts within the State of California.

The Ninth Circuit Court's decision to dismiss Petitioner's claim on the grounds of (1) judicial immunity from damages (2) the State of California tort statute, denited Petitioner the equal protection of the law; deprived Petitioner her right to property for which she contracted; deprived her right to substantive due process; deprived her right to vindicate her Constitutionaly secured rights.

The Ninth Circuit Court decision in this case, does not comport with other decisions of the Court, and, is not authorized by The Constitution. The decision and opinion, in it's effect, constitutes an abrogation of the Ninth, Tenth, Fourteenth, Fifth, First Amendments, Article I Section 10, Clause 1; and Article VI Clause 2, Clause 3, of the Constitution of the United States. ---and the Federal Civil Rights Act of April 9, 1866 , Chapter 31, Statute 27, and the Federal Civil Rights Act of April 20, 1871, Chapter 22, Statute 13.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that a Writ of Certiorari should issue to review the decision and opinion of the Ninth Circuit in this Case.

Respectfully submitted,

Elma E. DeLand

Elma E. DeLand
Pro Per

ne____1975.

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Appendix "A"

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ELMA E. DELAND, *Plaintiff-Appellant,* vs. BONSALL NOON, et al., *Defendants-Appellees.*	No. 74-1445 MEMORANDUM

[March 25, 1975]

Appeal from the United States District Court
Southern District of California

Before: CARTER, WRIGHT and TRASK,
Circuit Judges.

The plaintiff in this case claims that a California Superior Court Judge and three Judges of the Court of Appeal all conspired to violate her civil rights. The claim arises from litigation in which the Superior Court Judge ruled against her and the Court of Appeal affirmed. In the present civil rights action, the district court dismissed her complaint on the grounds of (1) judicial immunity and (2) the statute of limitations. We affirm.

(1) Judges are immune from liability for damages for acts committed within their judicial jurisdiction. *Gregory v. Thompson*, 500 F.2d 59, 62 (9 Cir. 1974); *Cadena v. Perasso*, 498 F.2d 383 (9 Cir. 1974).

(2) The California three-year tort statute of limitations applies to civil rights actions. *Ney v. California*, 439 F.2d 1285, 1287 (9 Cir. 1971). The plaintiff did not file within the three-year period and so her claim was untimely.

The judgment of dismissal is affirmed.

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App B"

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and Gerald Brown

FILED

JAN 9 - 1974

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY C. E. REICHENBERG DEPUTY

ENTERED

JAN 9 - 1974

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT of CALIFORNIA
BY _____

UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF CALIFORNIA

ELMA E. DeLAND,

Plaintiff,

vs.

BONSALL NOON, VINCENT WHELAN, MARTIN COUGHLIN, GERALD BROWN,

Defendants.

Civ. No. 73-503-E

ORDER OF DISMISSAL

The following motions having come on regularly for hearing on January 7, 1974 before the Honorable John C. Bowen, Judge of the United States District Court: the motion of defendant Bonsall Noon for an order dismissing the action on the grounds that plaintiff's suit is barred by the Statute of Limitations and the complaint fails to state a cause of action upon which relief can be granted, the motion of defendants Vincent Whelan, Martin Coughlin, and Gerald Brown for an order dismissing the action on the grounds that plaintiff's suit is barred by the Statute of Limitations and the complaint fails to state a cause of action upon which relief can be granted, the motion of plaintiff Elma DeLand for default judgment and the motion of plaintiff Elma DeLand for summary judgment, Elma E. DeLand appearing in propria personae; Robert G. Berrey, County Counsel by Lloyd M. Harmon, Jr., Deputy appearing on behalf of defendants

Bonsall Noon and Evelle Younger, Attorney General by Jay Bloom, Deputy Attorney General, appearing on behalf of defendants Vincent Whelan, Martin Coughlin, and Gerald Brown. The matter having been argued by the parties and submitted to the court for decision and good cause appearing, and the court finding that all original papers filed in this action by defendants have been signed by the attorneys of record;

IT IS ORDERED, ADJUDGED AND DECREED that:

1. The above entitled action be and is hereby dismissed as to defendants Bonsall Noon, Vincent Whelan, Martin Coughlin, and Gerald Brown for the reasons that the action is barred by the Statute of Limitations and the complaint fails to state a cause of action upon which relief can be granted.

2. Plaintiff's motion for default judgment is denied.

3. Plaintiff's motion for summary judgment is denied.

DATED: Jan 9, 1974

John C. Bowen
Judge of the District Court

Approved as to form and content:
Lloyd B. Harmon Jr.

Approved as to form and content
A. W. Stetson
Deputy Attorney General
for defendants Whelan, Coughlin and Brown

I hereby attest and certify, on 1-9-74 that the foregoing document is a full, true and correct copy of the original on file in my office and in my legal custody.

PAGES BOUND VERTICALLY
BLEED THROUGH

CHAP. XXXI. — *An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication.* April 9, 1866.

Who are citizens of the United States;

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

their rights and obligations.

Penalty for depriving any person of any right protected by this act, by reason of color or race, &c.

Sec. 2. *And be it further enacted*, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

Courts of the United States to have jurisdiction of offences under this act.

Sec. 3. *And be it further enacted*, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.

Suits commenced in State courts may be removed on defendant's motion.

1865, ch. 90. Vol. xiii. p. 507.

1863, ch. 87. Vol. xii. p. 755.

Jurisdiction to be enforced according to the laws of the United States, or the common law, &c.

District attorneys, &c., to institute proceedings against all violating this act.

SEC. 4. *And be it further enacted*, That the district attorneys, marshals, and deputy marshals of the United States, the commissioners appointed by the circuit and territorial courts of the United States, with powers of arresting, imprisoning, or bailing offenders against the laws of the United States, the officers and agents of the Freedmen's Bureau, and every other officer who may be specially empowered by the President of the United States, shall be, and they are hereby, specially authorized and required, at the expense of the United States, to institute proceedings against all and every person who shall violate the provisions of this act, and cause him or them to be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States or territorial court as by this act has cognizance of the offence. And with a view to affording reasonable protection to all persons in their constitutional rights of equality before the law, without distinction of race or color, or previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, and to the prompt discharge of the duties of this act, it shall be the duty of the circuit courts of the United States and the superior courts of the Territories of the United States, from time to time, to increase the number of commissioners, so as to afford a speedy and convenient means for the arrest and examination of persons charged with a violation of this act; and such commissioners are hereby authorized and required to exercise and discharge all the powers and duties conferred on them by this act, and the same duties with regard to offences created by this act, as they are authorized by law to exercise with regard to other offences against the laws of the United States.

Number of commissioners appointed by circuit and territorial courts to be increased; their authority.

Marshals, &c., to obey all precepts under this act.

Penalty for refusal, &c.

SEC. 5. *And be it further enacted*, That it shall be the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of this act, when to them directed; and should any marshal or deputy marshal refuse to receive such warrant or other process when tendered, or to use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars, to the use of the person upon whom the accused is alleged to have committed the offence. And the better to enable the said commissioners to execute their duties faithfully and efficiently, in conformity with the Constitution of the United States and the requirements of this act, they are hereby authorized and empowered, within their counties respectively, to appoint, in writing, under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; and the persons so appointed to execute any warrant or process as aforesaid shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged, and to insure a faithful observance of the clause of the Constitution which prohibits slavery, in conformity with the provisions of this act; and said warrants shall run and be executed by said officers anywhere in the State or Territory within which they are issued.

Commissioners may appoint persons to execute warrants.

Authority of such persons.

Warrants to run where.

Penalty for obstructing process under this act;

for rescue, &c.;

for aiding to escape;

for harboring, &c.

SEC. 6. *And be it further enacted*, That any person who shall knowingly and wilfully obstruct, hinder, or prevent any officer, or other person charged with the execution of any warrant or process issued under the provisions of this act, or any person or persons lawfully assisting him or them, from arresting any person for whose apprehension such warrant or process may have been issued, or shall rescue or attempt to rescue such person from the custody of the officer, other person or persons, or those lawfully assisting as aforesaid, when so arrested pursuant to the authority herein given and declared, or shall aid, abet, or assist any person so arrested as aforesaid, directly or indirectly, to escape from the custody of the officer or other person legally authorized as aforesaid, or shall harbor or

conceal any person for whose arrest a warrant or process shall have been issued as aforesaid, so as to prevent his discovery and arrest after notice or knowledge of the fact that a warrant has been issued for the apprehension of such person, shall, for either of said offences, be subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months, by indictment and conviction before the district court of the United States for the district in which said offence may have been committed, or before the proper court of criminal jurisdiction, if committed within any one of the organized Territories of the United States.

Fees of district attorneys, marshals, clerks, commissioner, &c.;

SEC. 7. *And be it further enacted*, That the district attorneys, the marshals, their deputies, and the clerks of the said district and territorial courts shall be paid for their services the like fees as may be allowed to them for similar services in other cases; and in all cases where the proceedings are before a commissioner, he shall be entitled to a fee of ten dollars in full for his services in each case, inclusive of all services incident to such arrest and examination. The person or persons authorized to execute the process to be issued by such commissioners for the arrest of offenders against the provisions of this act shall be entitled to a fee of five dollars for each person he or they may arrest and take before any such commissioner as aforesaid, with such other fees as may be deemed reasonable by such commissioner for such other additional services as may be necessarily performed by him or them, such as attending at the examination, keeping the prisoner in custody, and providing him with food and lodging during his detention, and until the final determination of such commissioner, and in general for performing such other duties as may be required in the premises; such fees to be made up in conformity with the fees usually charged by the officers of the courts of justice within the proper district or county, as near as may be practicable, and paid out of the Treasury of the United States on the certificate of the judge of the district within which the arrest is made, and to be recoverable from the defendant as part of the judgment in case of conviction.

to be paid from the treasury of the United States, and to be recoverable from defendant when convicted.

President may direct the judge, &c., to attend, &c., for the more speedy trial of persons charged with violating this act;

SEC. 8. *And be it further enacted*, That whenever the President of the United States shall have reason to believe that offences have been or are likely to be committed against the provisions of this act within any judicial district, it shall be lawful for him, in his discretion, to direct the judge, marshal, and district attorney of such district to attend at such place within the district, and for such time as he may designate, for the purpose of the more speedy arrest and trial of persons charged with a violation of this act; and it shall be the duty of every judge or other officer, when any such requisition shall be received by him, to attend at the place and for the time therein designated.

may enforce the act with the military and naval power.

SEC. 9. *And be it further enacted*, That it shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to prevent the violation and enforce the due execution of this act.

Appeal to the supreme court of the United States.

SEC. 10. *And be it further enacted*, That upon all questions of law arising in any cause under the provisions of this act a final appeal may be taken to the Supreme Court of the United States.

SCHUYLER COLFAX,
Speaker of the House of Representatives.
LA FAYETTE S. FOSTER,
President of the Senate, *pro tempore*.

In the Senate of the United States, April 6, 1866.

Bill passed over the veto of the President.

The President of the United States having returned to the Senate, in which it originated, the bill entitled "An act to protect all persons in the United States in their civil rights, and furnish the means of their vindication," with his objections thereto, the Senate proceeded, in pursuance of the Constitution, to reconsider the same; and,

Resolved, That the said bill do pass, two-thirds of the Senate agreeing to pass the same.

Attest:

J. W. FORNEY,
Secretary of the Senate.

In the House of Representatives U. S. April 9th, 1866.

The House of Representatives having proceeded, in pursuance of the Constitution, to reconsider the bill entitled "An act to protect all persons in the United States in their civil rights, and furnish the means of their vindication," returned to the Senate by the President of the United States, with his objections, and sent by the Senate to the House of Representatives, with the message of the President returning the bill:

Resolved, That the bill do pass, two-thirds of the House of Representatives agreeing to pass the same.

Attest:

EDWARD MCPHERSON, Clerk,
by CLINTON LLOYD, Chief Clerk.

April 10, 1866.

CHAP. XXXII.—*An Act granting to the State of Wisconsin a Donation of Public Lands to aid in the Construction of a Breakwater and Harbor and Ship Canal at the Head of Sturgeon Bay, in the County of Door, in said State, to connect the Waters of Green Bay with Lake Michigan, in said State.*

Grant of land to Wisconsin for breakwater, harbor, and ship canal.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is, granted to the State of Wisconsin for the purpose of aiding said State in constructing and completing a breakwater and harbor and ship canal to connect the waters of Green bay with the waters of Lake Michigan, two hundred thousand acres of public lands, to be selected in subdivisions agreeably to the United States survey, by an agent or agents appointed by the governor of said State, subject to the approval of the Secretary of the Interior, from lands subject to private entry: *Provided*, That said selections shall all be made from alternate and odd numbered sections of land nearest the location of said harbor and canal in said State not otherwise appropriated, and not from lands designated by the United States as "mineral" before the passage of this act, nor from lands to which the rights of pre-emption or homestead have attached.

Proviso. Selections, how made.

Lands subject to disposal of legislature, &c.

SEC. 2. *And be it further enacted*, That the said lands hereby granted shall be subject to the disposal of the legislature of said State, or, if the legislature thereof shall not be in session, or shall adjourn within ten days after the passage and approval of this act, then said lands shall be subject to the disposal of the governor and board of commissioners of school, university, and swamp lands of said State, for the purposes aforesaid, and for no other; and the said canal shall be and remain a public highway for the use of the government of the United States, free from toll or charge upon the vessels of said government, or upon vessels employed by said government in the transportation of any property or troops of the United States.

Canal to be public highway, &c.

Plans, &c., to be filed in departments.

SEC. 3. *And be it further enacted*, That before it shall be competent for said State to dispose of any of said lands, to be selected as aforesaid, the plan of said breakwater and harbor and the route of said canal shall be established, and a plat or plats thereof shall be filed in the office of the War Department, and a duplicate thereof filed in the office of the Commissioner of the General Land Office.

Unless work is completed in three years, unsold lands revert to the United States.

SEC. 4. *And be it further enacted*, That if the said breakwater, harbor, and canal, shall not be completed within three years from the passage of this act, the lands hereby granted and remaining unsold shall revert to the United States.

Account to be kept; and when

SEC. 5. *And be it further enacted*, That the legislature of said state shall cause to be kept an accurate account of the sales and net proceeds

CHAP. XXII.—*An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.* April 20, 1871.

Any person under color of any law, &c. of any State, depriving another of any right, &c. secured by the Constitution of the United States, made liable to the party injured.

Proceedings to be in the courts of the United States.

1866, ch. 31. Vol. xiv. p. 27.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

Penalty for conspiring by force to put down the government of the United States, &c.;

or to hinder the execution of any law of the United States;

or to seize any property of the United States;

or to prevent any person from holding office, &c. under the United States;

or to induce any officer to leave the State, &c.;

or to injure him in person or property while doing, or to prevent his doing, his duty;

or to prevent any party or witness from attending court or testifying therein;

or to injure him for so attending or testifying;

or to influence the conduct of any juror;

or to injure any juror on account of his acts, &c.

Penalty for conspiring or going in disguise upon the public highway, &c. to deprive any person or class of equal rights, &c. under the laws;

or to prevent the State authorities from protecting all in their equal rights.

Penalty for conspiring to obstruct, &c. the

SEC. 2. That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, or by force, intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or to injure his person while engaged in the lawful discharge of the duties of his office, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duty, or by force, intimidation, or threat to deter any party or witness in any court of the United States from attending such court, or from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such party or witness in his person or property on account of his having so attended or testified, or by force, intimidation, or threat to influence the verdict, presentment, or indictment, of any juror or grand juror in any court of the United States, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or on account of his being or having been such juror, or shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or shall conspire together for the purpose of in any manner impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, or by force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful

due course of justice, &c. In any State with intent to deny to any citizen his equal rights under the law; or, by force, &c. to prevent any citizen entitled to vote from advocating in a lawful manner the election of any person, as, &c.

Courts. Punishment. Any conspirator doing, &c. any act in furtherance of the object of the conspiracy, and thereby injuring another, to be liable in damages therefor.

Proceedings to be in courts of the United States. 1866, ch. 31. Vol. xiv. p. 27.

manner towards or in favor of the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy, each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States or district or supreme court of any Territory of the United States having jurisdiction of similar offences, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine. And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy, such action to be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts under the provisions of the act of April ninth, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication."

What to be deemed a denial by any State to any class of its people of their equal protection under the laws.

SEC. 3. That in all cases where insurrection, domestic violence, unlawful combinations, or conspiracies in any State shall so obstruct or hinder the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by this act, and the constituted authorities of such State shall either be unable to protect, or shall, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States; and in all such cases, or whenever any such insurrection, violence, unlawful combination, or conspiracy shall oppose or obstruct the laws of the United States or the due execution thereof, or impede or obstruct the due course of justice under the same, it shall be lawful for the President, and it shall be his duty to take such measures, by the employment of the militia or the land and naval forces of the United States, or of either, or by other means, as he may deem necessary for the suppression of such insurrection, domestic violence, or combinations; and any person who shall be arrested under the provisions of this and the preceding section shall be delivered to the marshal of the proper district, to be dealt with according to law.

When the due execution of the laws, &c. is obstructed by violence, &c. the President shall do what he may deem necessary to suppress such violence, &c.

Persons arrested to be delivered to the marshal.

What unlawful combinations to be deemed a rebellion against the government of the United States.

SEC. 4. That whenever in any State or part of a State the unlawful combinations named in the preceding section of this act shall be organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or set at defiance the constituted authorities of such State, and of the United States within such State, or when the constituted authorities are in complicity with, or shall connive at the unlawful purposes of, such powerful and armed combinations; and whenever, by reason of either or all of the causes aforesaid, the conviction of such offenders and the preservation of the public safety shall become in such district impracticable, in every such case such combinations shall be deemed a rebellion against the government of the United

States, and during the continuance of such rebellion, and within the limits of the district which shall be so under the sway thereof, such limits to be prescribed by proclamation, it shall be lawful for the President of the United States, when in his judgment the public safety shall require it, to suspend the privileges of the writ of habeas corpus, to the end that such rebellion may be overthrown: *Provided*, That all the provisions of the second section of an act entitled "An act relating to habeas corpus, and regulating judicial proceedings in certain cases," approved March third, eighteen hundred and sixty-three, which relate to the discharge of prisoners other than prisoners of war, and to the penalty for refusing to obey the order of the court, shall be in full force so far as the same are applicable to the provisions of this section: *Provided further*, That the President shall first have made proclamation, as now provided by law, commanding such insurgents to disperse: *And provided also*, That the provisions of this section shall not be in force after the end of the next regular session of Congress.

During such rebellion, and within certain limits, the President may suspend the writ of habeas corpus.

Provisions of act 1863, ch. 81, § 2, Vol. xii. p. 755, made applicable hereto.

Proclamation to be first made, &c.

Vol. i. p. 424. Vol. xii. p. 283. See pp 949-954.

This section not to be in force after, &c.

SEC. 5. That no person shall be a grand or petit juror in any court of the United States upon any inquiry, hearing, or trial of any suit, proceeding, or prosecution based upon or arising under the provisions of this act who shall, in the judgment of the court, be in complicity with any such combination or conspiracy; and every such juror shall, before entering upon any such inquiry, hearing, or trial, take and subscribe an oath in open court that he has never, directly or indirectly, counselled, advised, or voluntarily aided any such combination or conspiracy; and each and every person who shall take this oath, and shall therein swear falsely, shall be guilty of perjury, and shall be subject to the pains and penalties declared against that crime, and the first section of the act entitled "An act defining additional causes of challenge and prescribing an additional oath for grand and petit jurors in the United States courts," approved June seventeenth, eighteen hundred and sixty-two, be, and the the same is hereby, repealed.

Certain persons not to be jurors in certain cases.

Jurors to take oath.

False swearing in taking this oath to be perjury.

Repeal of first section of act 1862, ch. 103. Vol. xii. p. 430.

SEC. 6. That any person or persons, having knowledge that any of the wrongs conspired to be done and mentioned in the second section of this act are about to be committed, and having power to prevent or aid in preventing the same, shall neglect or refuse so to do, and such wrongful act shall be committed, such person or persons shall be liable to the person injured, or his legal representatives, for all damages caused by any such wrongful act which such first-named person or persons by reasonable diligence could have prevented; and such damages may be recovered in an action on the case in the proper circuit court of the United States, and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in such action: *Provided*, That such action shall be commenced within one year after such cause of action shall have accrued; and if the death of any person shall be caused by any such wrongful act and neglect, the legal representatives of such deceased person shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of such deceased person, if any there be, or if there be no widow, for the benefit of the next of kin of such deceased person.

Any person knowing that certain wrongs are about to be done, and having power to prevent, &c., neglects so to do, and any such wrong is done, is made liable for all damages caused thereby.

Suits therefor in courts of the United States.

Who may be joined as defendants.

Limitation.

If death is caused by such wrongful act, the legal representatives of deceased may maintain action, &c. and for whose benefit.

SEC. 7. That nothing herein contained shall be construed to supersede or repeal any former act or law except so far as the same may be repugnant thereto; and any offences heretofore committed against the tenor of any former act shall be prosecuted, and any proceeding already commenced for the prosecution thereof shall be continued and completed, the same as if this act had not been passed, except so far as the provisions of this act may go to sustain and validate such proceedings.

Former laws, &c. not repealed, &c.

Former offences to be prosecuted.

APPROVED, April 20, 1871.

DIVISION III

Rules for Publication of Appellate Opinions

Adopted by the Supreme Court of the State of California, effective January 1, 1964*

Rule 976. [Publication of appellate opinions]

(a) [Supreme Court] All opinions of the Supreme Court shall be published in the Official Reports.

(b) [Standard for opinions of other courts] An opinion of a Court of Appeal or of an appellate department of the superior court shall be published in the Official Reports if it involves a new and important issue of law, a change in an established principle of law, or a matter of general public interest. [As amended effective November 11, 1966.]

(c) [Courts of Appeal] Every opinion of a Court of Appeal shall be deemed to meet the standard for publication specified in subdivision (b) and shall be published in the Official Reports unless (1) a majority of the court rendering the opinion certifies that it does not meet the standard for publication and specifies it for nonpublication and (2) either no petition for hearing in the Supreme Court is filed in the cause or the petition is denied by the Supreme Court without ordering publication of the Court of Appeal opinion. [As amended effective November 11, 1966.]

(d) [Appellate departments] Unless otherwise directed by the Supreme Court, an opinion of an appellate department shall be published in the Official Reports if two of the judges joining in the opinion certify that it meets the standard for publication specified in subdivision (b).

(e) [Superseded opinions] Regardless of the foregoing provisions of this rule, no opinion superseded by the granting of a hearing, rehearing or other judicial action shall be published in the Official Reports.

(f) [Editing] Written opinions of the Supreme Court, Courts of Appeal, and appellate departments of the superior courts shall be filed with the clerks of the respective courts. Two copies of

* Adopted pursuant to the authority contained in Section 14, Article VI, California Constitution; and Gov. Code Sec. 68895.

Exhibit "1"

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each opinion of the Supreme Court, two copies of each opinion of a Court of Appeal required to be published pursuant to this rule, and two copies of each opinion of an appellate department of a superior court which the court has certified as meeting the standard for publication specified in subdivision (b) shall be furnished by the clerk to the Reporter of Decisions. The Reporter of Decisions shall edit the opinions for publication as directed by the Supreme Court. Proof sheets of each opinion in the type to be used in printing the reports shall be submitted by the Reporter of Decisions to the court which prepared the opinion for examination, correction and final approval. [As amended effective November 11, 1966.]

Collateral References:

Cal Jur 2d Appeal and Error § 626.
McKinney's Cal Dig Appeal and Error § 1351.
5 Am Jur 2d Appeal and Error § 901.

Law Review Articles:

Selective publication of case law. 39 SCLR 608.

Appendix "F"

HERVEY & MITCHELL
ATTORNEYS AT LAW
SUITE 1204 SAN DIEGO TRUST & SAVINGS BUILDING
SAN DIEGO, CALIFORNIA 92101
PHONE BELMONT 3-7788

(SPACE BELOW FOR FILING STAMP ONLY)

FILED
R. B. JAMES, Clerk
MAR 7 1966
t. j. auer

Attorneys for Defendant and Cross Complainant

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

ROY O. DeLAND and ELMA DeLAND,

Plaintiffs and Cross Defendants,

vs.

HENRY F. EUGENHAGEN,

Defendant and Cross Complainant.

No. 289825

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The trial of the above entitled cause was regularly concluded on the 3d day of February, 1966, in Department ELN of the above entitled Court, the Honorable BONSALL NOON, Judge Presiding, the Plaintiffs appearing in person and by their counsel, MILLYER, CRAKE & IRWIN, by OSCAR F. IRWIN, and the Defendant appearing in person and by his counsel, HERVEY & MITCHELL, by JAMES EDGAR HERVEY. Evidence both oral and documentary having been received, and the cause having been submitted to the Court for its decision, after deliberation the Court makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

I. That the allegations set forth in Paragraphs I, II, III and IV of the first cause of action of Plaintiffs' Complaint, and Paragraphs II, III, IV and V of the second cause of action of Plaintiffs' Complaint, are true.

2. That the allegations set forth in Paragraphs VI and VII of the first cause of action of Plaintiffs' Complaint, and Paragraphs VI and VIII of the second cause of action of Plaintiffs' Complaint are untrue.

3. That the Defendant substantially performed all of the terms, covenants and conditions of the building construction contract in good faith and completed construction in a good and workmanlike manner on or about the 19th day of August, 1964. That any deviations from the building construction contract and the plans and specifications were not willful, intentional or fraudulent, and do not substantially affect the usefulness of the residence for the purpose for which it was intended, and can be compensated in damages to be deducted from the contract price.

4. That the parties have mutually waived any further arbitration pursuant to the building contract and have submitted the matter to the Court for its determination.

5. That the allegations set forth in Paragraphs I, II, III, IV and V of the first cause of action of Plaintiffs' Complaint are true.

6. That during the course of construction the Defendant, at the special request and instance of the Plaintiffs, and with their full knowledge, consent and approval, furnished certain extra labor, materials and equipment for which the Plaintiffs agreed to pay the reasonable cost thereof. That the reasonable cost of said extra labor, materials and equipment is $2,083.52.

7. That the Plaintiffs and the Defendant are mutually responsible for the delay in the completion of the residence pursuant to the building contract.

8. That the Plaintiffs and the Defendant entered into an agreement to arbitrate on the 9th day of February, 1964, and agreed to be bound by the arbitration decision. That the three arbitrators selected and agreed by the parties, after taking evidence and

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making an investigation of the residence, prepared and submitted their report and decision on the 15th day of April, 1964, directing the Defendant to do certain remedial and corrective work on the residence. That the Defendant relied upon the Plaintiffs' agreement to be bound by the arbitration decision, and with the knowledge, consent and approval of the Plaintiffs performed and completed the things to be done on his part pursuant to the arbitration decision. That after encouraging and acquiescing in the Defendant's performance pursuant to the arbitration decision, the Plaintiffs disclaimed any responsibility thereunder. That the Plaintiffs have received benefits pursuant to the Defendant's performance under the arbitration decision to which they would not have otherwise been entitled by the building construction contract, and at the Defendant's expense.

That during the course of the construction of the residence the Plaintiffs consented and agreed to various extra and corrective procedures which constituted deviations from the literal terms of the construction contract. That reasonable compensation to be allowed the Plaintiffs by way of set-off against the construction contract price for said deviations from the construction contract is $1,388.63.

CONCLUSIONS OF LAW

From its findings of fact the Court makes the following conclusions of law:

1. That the Plaintiffs are entitled to a set-off against the contract price for the construction of the residence in the sum of $1,388.63.

2. That the Defendant is entitled to a judgment against the Plaintiffs for the sum of $18,163.52, less the set-off aforesaid.

3. That each party bear their own counsel fees and court costs herein.

HERVEY & MITCHELL
ATTORNEYS AT LAW
SUITE 1204
SAN DIEGO TRUST AND
SAVINGS BUILDING

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: [illegible] 1966.

Bonsall Noon

JUDGE OF THE SUPERIOR COURT

BONSALL NOON

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App "C"

p1

CERTIFIED FOR NONPUBLICATION

IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROY O. DeLAND and ELMA DeLAND,

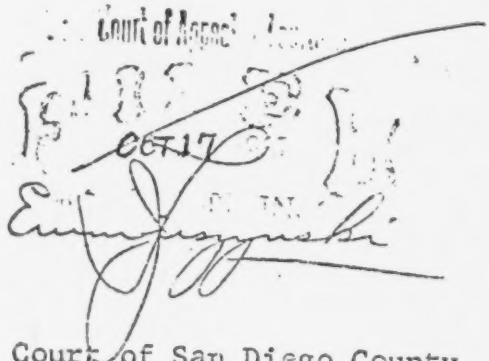
Plaintiffs, Cross-Defendants and Appellants,

v.

HENRY F. BUGENHAGEN,

Defendant, Cross-Complainant and Respondent.

4 Civil No. 8527



OPINION

APPEAL from a judgment of the Superior Court of San Diego County. Bonsall Noon, Judge. Affirmed.

Hillyer, Crake & Irwin and Oscar F. Irwin for Plaintiffs, Cross-Defendants and Appellants.

Hervey & Mitchell for Defendant, Cross-Complainant and Respondent.

Plaintiffs Roy O. DeLand (DeLand) and Elma DeLand (Mrs. DeLand), husband and wife, sought declaratory relief as to their rights under a written contract with defendant, a licensed general contractor, for construction by the latter of a residence upon a lot owned by plaintiffs; and damages of $20,000 for alleged breach by defendant. A cross-complaint by defendant sought recovery of the balance of $16,080 unpaid on the contract, and $2,546.39 for authorized extras. The contract price was $40,200.

The court made, among others, the following findings:

> "3. That the Defendant substantially performed all of the terms, covenants and conditions of the building construction contract in good faith and completed construction in a good and workmanlike manner on or about the 19th day of August, 1964. That any deviations from the building construction contract and the plans and specifications were not willful, intentional or fraudulent, and do not substantially affect the usefulness of the residence for the purpose for which it was intended,

and can be compensated in damages to be deducted from the contract price.

"4. That the parties have mutually waived any further arbitration pursuant to the building contract and have submitted the matter to the Court for its determination.

" . . . . . .

"7. That the Plaintiffs and the Defendant are mutually responsible for the delay in the completion of the residence pursuant to the building contract.

"8. That the Plaintiffs and the Defendant entered into an agreement to arbitrate on the 9th day of February, 1964, and agreed to be bound by the arbitration decision. That the three arbitrators selected and agreed by the parties, after taking evidence and making an investigation of the residence, prepared and submitted their report and decision on the 15th day of April, 1964, directing the Defendant to do certain remedial and corrective work on the residence. That the Defendant relied upon the Plaintiffs' agreement to be bound by the arbitration decision, and with the knowledge, consent and approval of the Plaintiffs performed and completed the things to be done on his part pursuant to the arbitration decision. That after encouraging and acquiescing in the Defendant's performance pursuant to the arbitration decision, the Plaintiffs disclaimed any responsibility thereunder. That the Plaintiffs have received benefits pursuant to the Defendant's performance under the arbitration decision to which they would not have otherwise been entitled by the building construction contract, and at the Defendant's expense.

"That during the course of the construction of the residence the Plaintiffs consented and agreed to various repairs and corrective procedures which constituted deviations from the literal terms of the construction contract. That reasonable compensation to be allowed the Plaintiffs by way of set-off against the construction contract price for said deviations from the construction contract is $1,388.63."

This court found also that certain extras had been furnished at the request of plaintiffs of the value of $2,083.52.

Judgment was entered in favor of the defendant for the value of the extras, and for the unpaid balance of the contract price less $1,388.63, the amount charged against defendant for deviations and defects.

PLAINTIFFS' CONTENTIONS

Plaintiffs contend that there was no substantial evidence to support the finding that the contract had been substantially performed by defendant; that there were intentional major deviations from the plans and specifications which were a part of the contract, so that the measure of damages should have been the cost of redoing the work strictly according to the contract.

The major breaches claimed by plaintiffs were with regard to the roofing of the house, the material used for the sub-flooring, and the interior plaster. Other claimed defects had to do with the combination shower and water closet, exterior paint, retaining wall, insulation batts in the ceiling, rabbet stops, garage floor, steel dowels, six-inch curb above the garage foundation, chimney, garage door, and plaster bullnose.

The credits allowed plaintiffs included amounts for correcting the retaining wall and the garage door, the chimney, the combination shower and water closet, and the exterior paint. An allowance was made for the difference in cost ($50) between exterior plywood called for by the contract, and interior plywood actually installed as the sub-floor.

THE EVIDENCE

The evidence is conflicting as to whether the sub-flooring actually installed as the result of an error was substantially equal to that called for by the contract; there was evidence that it was substantially equal for the purpose to be served.

There was evidence that the thickness of the interior plaster in places was less than called for by contract and by the building code; that there would, however, be variations in thickness of hand-applied plaster to preserve an even surface; the plastering was not deficient or defective in good building practice; that the city building inspection department had examined it, and that after such examination Mrs.

DeLand protested unsuccessfully to the building inspector and various other agencies of government the decision of the building department that the plastering met the city's requirements.

The house had a floor area of some 2,000 square feet, exclusive of a garage with an area of some 300 square feet.

The exterior walls for the purpose of painting them had a surface area of some 2,200 square feet.

In addition to the inner surface of the outside walls of the house, some of the ceilings and some of the partition walls separating different rooms were plastered.

The house had an entrance hall, living room, dining room, two bedrooms, kitchen, two bathrooms, a shower room, and laundry room. The plastered surfaces must have had an area of nearly 3,000 square feet.

The samples of the plastering received in evidence were at most seven in number, the largest of which had surface dimensions of 5-3/4 inches by 4-1/2 inches, two taken from the corner of the hall, one from the hall ceiling, a fourth also from the hall, one from the hall linen closet, one from the garage wall.

There was expert testimony that it is almost impossible to obtain hand-applied plaster of an exact and uniform thickness because of several factors.

Defendant admitted that there could not be a constant half-inch of plaster throughout the house; refused to make such an admission with regard to the fire wall.

Plaintiffs assign as error the admission into evidence of a letter from the building inspector to Mrs. DeLand over objection that it was hearsay.

It was, of course, not admissible as evidence of the truth of anything stated therein, but it was admissible for the purpose of showing the reaction that it produced in the plaintiffs in making the protests that they made. In cross-examination of Mrs. DeLand, her

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counsel objected to certain questions concerning her response to the contents of the letter upon the ground that the letter was in evidence and was the best evidence of its contents.

The plans and specifications called for four layers of roofing material of a certain weight. Four layers of a standard brand of material purporting to be of the prescribed weightwere applied; in fact the material was of less than the weight it was advertised to be. The city building department refused to approve the roofing job, and at first required that the roofing material be removed and new roofing material applied; later the department agreed to approve the roof if two additional layers of material were applied and the roof then mopped with hot tar. The DeLands agreed to that solution, which was then carried out.

Testimony of plaintiffs' expert witness that the roofing was not done in a workmanlike manner was controverted by another builder whose testimony the court accepted.

The plaintiffs' expert suggested certain solutions. He suggested that there be removed all the gypsum board and plaster and cabinets and fixtures necessarily incident thereto, and that new lath and plaster and any cabinets and fixtures required be installed at a cost of $2,800 plus 30 per cent. The original estimate of the cost of the plastering job was $1,800 plus 10 per cent.

He suggested that all the existing sub-flooring be removed, as well as all cabinets, fixtures and finish floor necessarily incident thereto, and that the exterior plywood be laid and cabinets, fixtures and finish floor be installed, at a cost of $3,784 plus 30 per cent. The original estimate of the cost of the exterior plywood flooring was $335 plus 10 per cent. The difference in the cost of the material actually used and that specified was $23.

He suggested that the existing roof be removed and replaced at a cost of $976 plus 30 per cent.

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He estimated the cost of adding 18-inch "weep holes" in the retaining wall to be $1,061 plus 30 per cent.

He suggested the living room window wall millwork be replaced, entailing the removal of the glass and its reinstallation and repainting at a cost of $1,094 plus 30 per cent.

There was a sharp conflict in the evidence on the subject of the cost of repairing certain defects, such as the addition of 18 weep holes to the retaining wall. On that item defendant's witness gave a figure of $90 for labor and materials.

There was similar conflict as to whether certain procedures followed gave an equivalent result in function and appearance to those called for by the plans or specifications; and whether plaintiffs had approved certain departures from the plans and specifications. In general the court accepted the testimony of the defense witnesses on those matters.

After making an inspection of the premises, the result of which is a part of the evidence, the court, in orally announcing his decision, expressed the strong scepticism with which he viewed the cost estimates of plaintiffs' expert witness in the light of what he had himself observed.

Plaintiffs, early in 1964 during the course of construction, consulted Attorney Clayton. At a meeting with defendant in Clayton's office, an oral agreement was reached that if certain of plaintiffs' contested demands were met, other such demands made by plaintiffs should be taken care of by renegotiation of the contract price. Defendant did the things he agreed to do.

Later plaintiffs consulted Attorney Paine, who prepared an arbitration agreement signed by all the parties. Arbitrators were appointed, met and made written findings as to what was required to be done by the parties. Defendant performed substantially what was required of him and sought to make the decision of the arbitrators

binding on plaintiffs by petitioning for a confirmation by the court. The petition was dismissed by the court because of technical defects in the procedure followed. Certain of the things done by the defendant pursuant to the decision of the arbitrators were beyond what the contract called for.

Plaintiffs, at the time of trial, had not occupied the home nor filed a notice of completion.

It is well settled by a long line of cases that substantial performance of a building contract will permit recovery by the contractor. (Hansen v. Covell, 218 Cal. 622; Atowich v. Zimmer, 218 Cal. 763; Rischard v. Miller, 182 Cal. 351 [substitution of flooring of lesser grade]; Collins v. Ramish, 182 Cal. 360; 1st Olympic Corp. v. Hawryluk, 185 Cal. App. 2d 832; Martin v. Karsh, 142 Cal. App. 2d 468; Conrad v. Foerst, 54 Cal. App. 277; J. Musto etc. Co. v. Pacific States Corp., 48 Cal. App. 452; Carpenter v. Ibbetson, 1 Cal. App. 272.)

The making of an allowance to the owner because of minor defects or variations is not inconsistent with a finding of substantial performance. (Hansen v. Covell, supra, 218 Cal. 622; Rischard v. Miller, supra, 182 Cal. 351; Collins v. Ramish, supra, 182 Cal. 360; 1st Olympic Corp. v. Hawryluk, supra, 185 Cal. App. 2d 832; Martin v. Karsh, supra, 142 Cal. App. 2d 468; Carpenter v. Ibbetson, supra, 1 Cal. App. 272.)

Whether there has been substantial performance is in each case a question of fact. (Collins v. Ramish, supra, 182 Cal. 360, 365; J. Musto etc. Co. v. Pacific States Corp., supra, 48 Cal. App. 452.)

Where there is substantial evidence to support such a finding, it will not be disturbed on appeal. (1st Olympic Corp. v. Hawryluk, supra, 185 Cal. App. 2d 832.)

We affirm the trial court's conclusion that the testimony of defendant and his expert witness was substantial evidence of substantial performance.

The court did not expressly find that the recommendations of plaintiffs' expert witness, if followed, would result in economic waste.[1] He did express himself to that effect in announcing his

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decision orally. Such a finding would have had substantial evidence to support it.

The case of Shell v. Schmidt, 164 Cal. App. 2d 350, cited by plaintiffs, is distinguishable from the case at bench by the fact that the former was tried only upon the issue of damages as the result of directions to that effect in an earlier appeal.

Other cases cited by plaintiffs (Bause v. Anthony Pools, Inc., 205 Cal. App. 2d 606; Milmoe v. Dixon, 101 Cal. App. 2d 257; Perry v. Quackenbush, 105 Cal. 299; Sanfran Co. v. Rees Blow Pipe Mfg. Co., 168 Cal. App. 2d 191; Tatham v. Pattison, 112 Cal. App. 2d 18; Thomas Haverty Co. v. Jones, 185 Cal. 285) do not compel a reversal.

The judgment is affirmed.

J.

WE CONCUR:

P.J.

J.

Certified for non-publication, Rule 976.

P. J.

J.

J.

I, JOHN R. McDOWELL, Clerk of the Court of Appeal, Fourth Appellate District, State of California do hereby certify that the preceding and annexed is a true and correct copy of Opinion as shown by the records of my office.

WITNESS my hand and the Seal of the Court this 31st day of March A.D. 1971

JOHN R. McDOWELL, Clerk

By Ea Peterson Deputy Clerk

Footnote 1: See Restatement of Contracts, §346: "Sometimes defects in a completed structure cannot be physically remedied without tearing down and rebuilding, at a cost that would be imprudent and unreasonable. The law does not require damages to be measured by a method requiring such economic waste."

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and they get them or explained it to them, and they agreed?

A Not construction details, now.

Q The specifications of what -- like a refrigerator or stove?

A Okay. Utilities.

THE COURT: Remember the reporter, will you please?

THE WITNESS: All right.

MR. IRWIN: I'm sorry.

THE WITNESS: I'm sorry.

Yes. Utilities, things of that nature.

BY MR. IRWIN:

Q Isn't it true that the DeLands had quite strong or held strong opinions of what they wanted to go into this home which was to be their home?

A I would say so.

Q And you were well aware of that after dealing with them for some six months to finally develop a set of plans and specifications that would give them a home they wanted; isn't that correct?

A I was becoming aware of it, yes.

Q You knew it at the time you bid or signed the building contract with them, did you not?

A Yes.

Q Now, this house, was it approximately 2300 square feet excluding the garage?

A I think that is pretty close, yes.

Q Which is a fairly good size house?

A It is above average, yes.

Q Three bedrooms, four?

A Three bedrooms, two baths or two -- well, two and a half baths, really.

Q You knew the DeLands did not have any children?

A Correct.

Q Now, after you got the bids from the subcontractors, did you prepare a written building construction contract on a standard Wolcotte 555 form, and submit it to them for their execution?

A Correct.

THE CLERK: Plaintiffs' Exhibit 3, a copy of a Building Construction Contract dated April 25, 1963, has been marked for identification only, your Honor.

(The copy of a construction contract was marked Plaintiffs' Exhibit Number 3, for identification.)

BY MR. IRWIN:

Q I show you Plaintiffs' 3, which is a Xerox copy, I believe, of the original rather than having one that you have to open and read on both sides of the page, and ask you if you recognize that as a true copy of the building contract?

A Yes. It is.

MR. IRWIN: We would offer it in evidence.

MR. HERVEY: No objection.

do that was outside the contract. And made a mention here of changes and additions that the Building Department would possibly impose, would be additional cost if necessary. And amendment for additions or changes by the owner would be cost of material and labor plus 10 per cent.

Q Now, the last item, number --

A 7.

Q -- 7. Yes. ". . . cost, plus 10% profit and overhead. . ."; was it your intention that the 10 per cent included profit and overhead or the 10 per cent was profit, and in addition you would add overhead?

A No. Combination. Profit and overhead, 10 per cent total.

Q Both would be included in the 10 per cent?

A Right.

Q Thank you.

The contract apparently was made April 25 of 1963, and the price was $40,200, correct?

A Correct.

Q And was to be completed within 170 days after commencement?

A That was the intent.

Q That is almost six months, correct?

A Correct.

Q Now, isn't that, considering the work was starting in the spring after the rainy season, longer than usual for

A I can't answer that question because I am not familiar with --.

Q Isn't this one of the very things that the DeLands continually complained to you about, was, one, that they did not have half-inch thick board; and, second, they didn't have a half-inch of plaster; and, third, there were only two coats instead of the specified three coats of plaster?

A There was no complaints. Other -- until the work was done. If this is what you mean. And again, as far as the three-coat plaster, this is, again was an oversight or a confliction or an ambiguity.

Q Ambiguity?

A Ambiguity with specified normal construction of this type of work.

Q All right. The plaster presumably in the normal course of the trade would have been to put in what the contract called for?

A Normally, yes.

Q All right. If the plans called for three coats of plaster, you sent through bids to get the three coats of plaster?

A No, because it is a residence, and it is an entirely -- what I am trying to say is that the drawings were erroneous, and the specifications, from the specifications.

Q No reason a person can't specify three coats of

plaster instead of two coats if he wants them and wants to pay for them?

A Yes. But the DeLands did not specify them. We did that. It isn't a question that they asked for that.

Q No plastering contractor came to you and asked you to clear up the ambiguity and said, "Do they really mean three coats of plaster instead of two coats?"; did he?

A No.

Q He considered if you as the general contractor put in three coats of plaster, that is what his contract called for?

A On the appearance of the drawings, it would seem so, yes.

Q He did not put in three coats as specified, he put in two coats, is that correct?

A Correct.

Q And you did not at any time seek a credit to the owner for the omission of the third coat that was called for in your specifications that you prepared, did you?

A Do you want to know why?

Q I do want to know why. First, did you ask for the credit --

A No.

Q -- for the owner?

You recognized and intended that the owner would rely on you as the general contractor to see that what was

board this price would have been higher.

Q He bid to put in a half-inch board according to the plans and specifications you prepared and gave a chosen sub to bid on?

A I didn't think he did. That is what I am trying to say.

Q Did he ever ask you,"Did you really mean a half-inch?" when --

A No.

Q So none of the subs ever came and said that they thought there was an error in these plans and specs that they were bidding on, did they?

A No.

Q None of them came and asked you whether or not you meant for them to put in what the plans and specs said or whether it was a mistake, did they?

A No.

Q And they never asked on the job either, did they?

A No.

Q They put in things that they felt were common and customary that were not in fact as specified, isn't that true?

A In this case.

Q All right.

Now, isn't it true that another thing that the DeLands wanted was plaster bullnose, and it was so called

Q Now, was the roof sheathing or sheeting contrary to what was specified in this house?

A This was another ambiguity. You are talking about the prefinish plywood sheathing on the roof; right?

Q I guess so.

A Okay. This was something that was put in the specifications and nowhere else mentioned on the drawings as far as being prefinished. There is no such thing. You do not get prefinish PlyScord sheathing. Which -- in the sense a prefinish would naturally mean a factory-finished; it wouldn't mean staining or painting it on the job.

Q Well, what is it then? Have you specified something that was impossible to fulfill?

A Correct.

Q It is just a mistake?

A Definitely.

Q Did you explain it to the owners when you found out or did you just go ahead and put in what you decided to put in, and when they asked you why it wasn't prefinished, then you told them?

A No, I didn't explain it to them. Put in what we intended to be in in the first place, which was half an inch PlyScoring.

Q There is no trouble in your specifications in all your years of experience of simply saying half-inch PlyScord, was there?

Q What year?

A '63.

Q We are talking about a little over two years ago?

A Uh-huh.

Q Have you seen the paint out there on the fascia this winter?

A Excuse me. '64. Yes.

Q It has been less than two years?

A Yes. Less than two years.

Q Good workmanship or good paint ought to be in such condition today that it wouldn't have to be repainted, isn't that true, on the fascia, for example, a vertical surface?

A I would say so.

Q All right.

Did you discuss with the owners that the paint that was being put on was other than the specified paint you had discussed with them when the plans and specs were drawn, and was better, or did you just do it and wait until they objected?

A When they came up and got into the discussion.

Q It was done then without their knowledge or consent?

A Yes.

Q The change was made, is that true?

A Yes.

heavier construction?

A Yes.

Q All right.

Isn't it true that you don't even know why you didn't bother to go to the owners and discuss this change with them?

A The door?

Q Yes.

A What do you mean I don't know?

Q No good reason why you didn't go to the owners?

A I didn't think it was necessary.

Q At this stage you were on notice that the DeLands were insisting that you build them what you designed for them, weren't you? And in fact that Mrs. DeLand was insisting she get what her contract called for, isn't that true?

A Yes.

Q And knowing the position they insisted, starting with the roof, that they would get in this house what they contracted to get, all of these items you have described, you still went and did them or made the changes without the owners' knowledge or consent; is that true?

A That is true.

Q Even though you considered them much more insistent or demanding and particular both in, one, watching the house being built; and, two, in insisting on literal

not?

A Yes.

Q Now, you say you completed the house. However, there are some minor items which remain to be done such as putting the trim around the log lighter valve -- isn't that true -- the collar?

A There possibly could. It has been some time. If it isn't there, it should be there.

Q A trim plate should be there, shouldn't it?

A Right.

Q Now, you told us about the plaster being three-eighths of an inch thick as customary; as a matter of fact the City Building Code requires a half-inch plaster, doesn't it?

A This is right.

Q So where you put in three-eighths-inch plaster that you described with those grounds, it is less than the minimum building code which required a hali inch?

A Could be. Used to be three-eighths of an inch thick.

Q Do you know what the building code requires?

A Yes.

Q It requires a half inch, doesn't it?

A This is right.

Q So it isn't up to building code if it isn't a half inch, isn't that true?

A Well, could be.

Q The plastering contractor presumably would be familiar with the fact that he has to put in a half inch plaster per coat, wouldn't he?

A Yes.

Q If he were using an inch grounds to plaster to, he couldn't get a half inch, is that correct?

A Correct; three-quarter-inch grounds.

Q They couldn't get the half inch then, is that right?

A That is right.

Q Your contract called for rough grading, isn't that true?

A Correct.

Q What does that mean to you?

A Rough grading around the perimeter of the house --

Q Yes?

A -- would mean that after construction the job is left in a state of -- well, rough grading simply means that it is basically uniform; doesn't have piles of dirt and debris and so forth in the area; and it is left clean. And, at least conform with the adjacent natural terrain.

Q All right. Would you consider proper rough grading if it was left in such a manner that the natural flow of the water would go right into the ventilation outlets in the foundation and under the house?

exterior glue.

BY MR. HERVEY:

Q Is the only difference between the two, the glue?

A Right. And the difference in price is exactly a penny and a half a square foot.

Q How much would the difference in price be between the -- in the interior at a penny and a half a foot, how much difference in expense was there?

A The total number of sheets, I think, is about 72 or 70. Came to about $35, including sales tax.

Q I think you have already testified that the putting of the word "exterior" on the specifications, which is the only place it appears, was an oversight, a mistake?

A Right.

Q Did you ever intend to use the exterior?

A No.

9 MR. IRWIN: Object. It is immaterial and irrelevant. Move to strike the answer, what he intended.

THE COURT: Be stricken.

BY MR. HERVEY:

Q Now, did the DeLands participate at all in the selection of what grade of subflooring would be used?

A No.

Q Well, did they leave the decision of the grade of the subflooring entirely to you?

A It was never discussed. We only discussed, I

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Q And where one had a higher standard, you would meet the higher standard?

A Yes, sir. Generally speaking.

Q You used a Wolcotte standard 555 Form for the building contract, and you are familiar with that form, are you not?

A Yes.

Q You have used it before, haven't you?

A Yes.

Q You knew, did you not, that your form of the contract which you gave the owners to sign provided in Paragraph 2: "The structure is to be constructed and completed in strict conformance with plans and specifications . . ."; correct?

A Right.

Q And: ". . . The structure is also to be constructed and completed in strict compliance with all laws, ordinances, rules and regulations of competent public authority . . ."; right?

MR. HERVEY: Just a minute. I will object to this line of questioning. The contract is in evidence and speaks for itself. This is argument.

THE COURT: It seems to be. Sustained.

MR. IRWIN: All right.

BY MR. IRWIN:

Q You knew about the clause in the contract that

Q Is there any relative difference between the 4-inch and 6-inch batts?

A There is two inches of material difference, and what that does is subject to the way that it is installed, and many factors such as this. Now, I am not an insulation expert and I am not prepared to say that -- to calculate what the heat loss would be through the two different systems. But I do know there is a difference.

Q I see.

A And, the 4-inch, if it is to be substituted, is going to require some explanation. A 6-inch batt of any description wouldn't require any explanation.

Q What do you mean by that?

A Well, I mean that the specifications aren't difficult to follow in this case. It is, simply requires a 6-inch batt. Not a particular one. It is not even explicit as to how it is to be installed.

Q So it would just be a matter of putting in a 6-inch batt and no matter who manufactured it, and then just using good workmanship as to the installing?

A That is correct.

Q All right.

Now in the previous figure you gave us on the plaster, to bring it up to code, if this was done at the same time, could it be bullnosed to meet the plaster bullnose requirement?

Q Concrete curb box, so to speak?

A Right.

Q Would you expect that that would be done?

A Yes.

Q What would it cost to put in this curb box to prevent water draining into the ventilation cutlets?

A $153.

Q In the cost items you have given us, Mr. Doughty, are those costs to the contractor or does that include a consideration or an addition for his profit and overhead?

A These -- these are the cost items that -- this is what it would cost the contractor to either do it himself or hire it done by employees or another subcontractor. They do not include a contractor's markup, profit and overhead.

Q What is the customary markup in this area if you hire a contractor to do the --

A Well, it ought to be 15 per cent. Many people charge 10 per cent. Many people charge less than that. So, I don't know. I think it should be 15 per cent.

Q For profit and overhead?

A Yes.

Q Now, to do the kind of work, that is, to get some contractor, let's say, come out and examine the residence and tell him that these items were to be redone, would there be any cost incurred, in your opinion, to the home

8632 LA JOLLA BLVD., LA JOLLA, CALIFORNIA

Appendix "J"

~~7-63~~ 202

HENRY F. BUGENHAGEN AIBD
MEMBER OF THE AMERICAN INSTITUTE OF BUILDING DESIGN
GLENCOURT 4-7159

App "J"

September 4, 1963

202

Mr. Howard B. Clayton
Attorney at Law
Suite 104, 7765 Girard Ave.
La Jolla, Calif.

Our attorney from August 26, 1963 to Jan 27, 1964

not seen by us till 1/27/64 when Mr Fairchild Clayton at this time we inquired this informative letter.

Dear Mr. Clayton:

Re: De Land Residence

For your request, I am submitting to you my reply to the owner's discrepancy and complaint list submitted to me August 17, 19, and 24, 1963.

we now wonder what they discussed

May I express my thanks for our discussion the other day as it helps me feel there is some understanding of intent between us.

honest?

Throughout the entire list I have made an honest effort to make a balanced evaluation of the complaints to the betterment of both parties and where structure and permanence was not an issue and the visual aspect was not a problem, I've offered what the approximate credit would be if it had been done the detailed or specified way. In some cases it probably cost us more to do it the alternate way. Many things have been corrected or alternates have been offered which in most cases will provide a better job.

If at all possible, I would appreciate it if you could project the following points to the owner.

what about objections and plans? and contract? deliberate deviations disregard?

1 - The Uniform Building Code enforced by the Building Inspection Department govern and control construction details and construction to insure structural safety, construction permanence and conformance to all local and state codes and ordinances. There are always several ways to achieve the same results and as long as safety, health, construction permanence, and visual objections have not been created, there is no realistic or practical reason why an alternate detail(s) cannot be used. Where an alternate detail is used and there may be some savings in material costs, the owner should be credited accordingly.

2 - Also I feel it should be pointed out that we are building a house not sewing machines, automobiles or other similar tool and die manufactured products which due to the nature of the materials and hand labor used, demand tolerances and variances which are universally used in the trade - without appreciably affecting the resultant workmanlike finish.

Yours truly,

Henry F. Bugenhagen

HFB/gjl

Bugenhagen has omitted Exhibit - his Correspondence and reply plus letter of complaint from it.

Clerk's note: Plaintiff's Counsel has removed Exhibit "J" from Court Clayton

Pltf.
vs.
Dft.
No. 214825
R. B. JAMES, County Clerk
By ____, Deputy
Dept. 10
Form 28 10M

App "J"

THE CITY OF SAN DIEGO

1349 Garnet Street

DEPARTMENT OF INSPECTION

October 15, 1963

(4)

Valley Roofing Company
5240 Fairmount Extension
San Diego, California; 92120

Attention: P. J. Ferdig

Subject: Composition Roofing on Residence under construction at 5116 Pacifica Drive, San Diego; Building Permit No. B62279

Dear Mr. Ferdig:

This is to notify you that the composition roofing, installed on the subject building by your company, does not meet the minimum requirements of the Building Laws of the City of San Diego (U.B.C. Sec. 3203).

After a review of the roofing application, which was made by personnel of this department in response to a complaint by the owners, indicated obvious non-compliance with the building laws, the owners engaged an independent testing agency to determine the extent to which the subject roofing did not comply with the job specifications and the City of San Diego Building Laws. The results of tests made on samples removed from the subject roof have been received by this office in Testing Engineers, Inc. Report No. 5018-1578.

The subject roofing was found to be in violation of the following sections of the Uniform Building Code, 1961 Edition, as adopted by the City of San Diego:

1. Sec. 3203 (a) - "The roof covering shall be securely fastened to the supporting roof construction." Furthermore, Sec. 3203(d) specifies that "Base sheets shall be nailed to the roof sheathing using not less than one nail to each one and one-third square feet (1-1/3 sq.ft.) of roof area. . .".

   The laboratory report shows present nailing to be inadequate where one nail is provided for roof area varying from 1.777 sq.ft. to 3.037 sq.ft.

2. Sec. 3203 (b) - ". . . built-up composition roof (shall be) thoroughly mopped solid between layers with bituminous compound using not less than twenty (20) pounds of hot asphalt . . . per one hundred square feet (100 sq.ft.) of roof area" (referred to as one square of roofing). Also, Sec. 3203(d) specifies that "hot asphalt shall be applied at a temperature of not less than 375°F. and shall in no case be heated to a temperature higher than 425°F. at the kettle".

Exhibit "14"

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The laboratory report shows that the roof covering consists of four (4) layers of roofing felt having an inadequate application of mopped asphalt between the layers and on the flood-coat surface. The report of quantitative tests indicates that the average total weight of the three (3) coats of asphalt applied to this roof is thirty-two (32) pounds per square where sixty (60) pounds per square is required (not including the flood-coat).

3. Table 32 A(c) - Gravel surfacing of ¼" to ½" aggregate applied to a composition roof shall weigh not less than four hundred (400) pounds per one hundred (100) square feet of roof area.

The laboratory analysis indicates that the average coverage is less than two hundred (200) pounds per square.

4. Table 32 A(a) - Asphalt-saturated roofing felt shall have a minimum weight of fourteen (14) pounds per one hundred (100) square feet.

The laboratory report indicates that the present roofing felt does not meet this minimum requirement because its average weight is approximately twelve (12) pounds per square.

Department records indicate that you were notified on August 22, 1963 by Notice of Correction No. 15792 (form 1A-13) to remove the non-complying roof and install a roof covering which meets the requirements of the approved plans and applicable sections of Chapter 32 of the Uniform Building Code. You are hereby notified to commence corrective action on the subject project by October 25, 1963 by removing the present roofing and replacing it with a complying roof covering. Failure to act on this matter will require institution of legal action by the Enforcement Section to obtain compliance with the Building Laws.

If you have any questions regarding this letter, please direct your inquiry to Mr. Robert R. Rathmann, Senior Building Inspector, at 488-0527.

Very truly yours,

H. P. Ringer, Director

by: W. R. McCullagh
District Inspection Engineer

WRMC:da

cc: Dr. Roy O. Deland
Henry Bugenhagen, General Contractor
Contractors State License Board
17.01
17.04 (2)

The foregoing instrument is a full, true and correct copy of the original on file in this office.

Attest: DEC 1 1970. 19

R. B. JAMIESON, County Clerk of the Superior Court of the State of California, in and for the County of San [illegible]

By J. Burris Deputy

J. BURRIS

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POOR COPY

May 8, 1964

ROY O. DeLAND, D.D.S.

Pedodontist

RECEIVED
MAY 9 1964

Bugenhagen Construction
733 Kline
La Jolla, Calif.

Dear Mr. Bugenhagen;

We herby give notice that action is being taken to petition the court to vacate the arbitration award in the matter of DeLand vs. Bugenhagen.

Sincerely,
Roy O. DeLand
Roy O. DeLand

1806 Cable Street • San Diego 7, California • ACademy 2-1787

Exhibit "26" (a)(b)

The foregoing instrument is a full, true and correct copy of the original on file in this office.

Attest DEC 1 1979 19

R. B. JAMES, Clerk of the Superior Court of the State of California, in and for the County of San Diego.

By J. Burns Deputy

J. BURNS

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